ORAL ARGUMENT NOT YET SCHEDULED
NO. 16-1249

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAYMONT (PA) INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

CORRECTED BRIEF OF PETITIONER

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAYMONT (PA) INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16-1249
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

PROVISIONAL CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court's rules, counsel for Graymont (PA) Inc. ("Graymont") certifies the following:

A. Parties and Amici

1. Graymont was the Respondent in the underlying proceedings before the National Labor Relations Board (the "Board").

2. Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (the "Union") was the Charging Party in the underlying proceedings before the NLRB. The Union has not at this time made any motion to intervene in this proceeding.

3. The Board is the Respondent before this Court.

4. There are no amici in this matter.

B. Rulings Under Review

Decision and Order of the National Relations Board in *Graymont PA, Inc. and Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, A Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO*, 364 NLRB No. 37 (June 29, 2016).

C. Related Cases

There are no related cases pending in any court.

So certified, this 8th day of November, 2016.

/s/ Eugene A. Boyle
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Graymont (PA) Inc., by its undersigned counsel, states that it is a wholly-owned subsidiary of Graymont Western US Inc., which is a wholly-owned subsidiary of CLI Holdings, Inc. (Nevada), which is a wholly-owned subsidiary of Graymont, Inc. (Nevada), which is a wholly-owned subsidiary of Graymont Limited (Canada). None of these companies is publicly traded.

Graymont (PA) Inc.'s general nature and purpose, insofar as relevant to this litigation, is to engage in the production and sale of lime-based products.

Dated: November 8, 2016

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

*** Authorities upon which we chiefly rely are marked with asterisks.**

STATUTES

OTHER AUTHORITIES

GLOSSARY

"Act"	National Labor Relations Act
"ALJ"	Administrative Law Judge David I. Goldman
"Board"	National Labor Relations Board
"CBA"	Collective Bargaining Agreement
"Graymont"	Graymont (PA) Inc.
"JA"	Joint Appendix
"Union"	Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

JURISDICTIONAL STATEMENT

This is a Petition for Review of a final Decision and Order of the National Labor Relations Board (the "Board") issued on June 29, 2016. The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 150 *et seq.* (the "Act"). The Court has jurisdiction to review the Board's Decision and Order under Section 10(f) of the Act. 29 U.S.C. § 160(f). Graymont timely sought review of the Board's Decision and Order in this Court; the Act does not specify any time period for filing a petition for review.

STATEMENT OF ISSUES

1. Whether the Board's findings and conclusions that Graymont violated Sections 8(a)(1) and (5) of the Act by failing to bargain over changes to its work rules, absenteeism policy, and progressive discipline schedule are supported by substantial evidence and reasonably consistent with prevailing law?

2. Whether the Board's findings and conclusions that Graymont violated Sections 8(a)(1) and (5) of the Act by failing to timely inform the Union that requested information did not exist are supported by substantial evidence and reasonably consistent with prevailing law?

3. Whether the Board erred by rejecting Graymont's interpretation of the collective bargaining agreement and finding that the Union did not waive its right to bargain over Graymont's changes to its work rules, absenteeism policy, and

progressive discipline schedule?

PERTINENT STATUTES

Sec. 8 of the Act, 29 U.S.C. § 158:

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> . . . .
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

Section 10 of the Act, 29 U.S.C. § 160:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

STATEMENT OF THE CASE

A. Procedural History

On June 15, 2014, the Union filed an unfair labor practice charge with the Board alleging that Graymont failed and refused to collectively bargain in good faith with the Union by unilaterally modifying its work rules, absenteeism policy, and progressive discipline schedule in violation of Sections 8(a)(1) and (5) of the

Act. (JA34.)[1] The Union also alleged that Graymont failed to produce information requested by the Union regarding Graymont's attendance and discipline policies. (*Id.*) The Board, through its Regional Director, investigated these charges and issued a complaint on June 27, 2014, alleging that Graymont had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5). (JA35-43.) Graymont filed a timely answer to the complaint on July 11, 2014, and subsequently amended that answer on August 26, 2014, to reflect that Graymont did not possess any documents, other than those already disclosed to the Union, responsive to the Union's request for information. (JA44-48.)

A hearing was held before Administrative Law Judge David I. Goldman ("ALJ") on September 16, 2014. (JA49-452.) Following that hearing, the Board filed a motion to amend its complaint to include a claim that Graymont failed to timely respond to the Union's request for information. (JA454.) On December 30, 2014, ALJ Goldman issued a proposed decision and order recommending that the Board find that Graymont violated the Act by unilaterally implementing certain changes to its work rules and absenteeism policies without providing the Union an opportunity to bargain over the changes. (JA453-484.) ALJ Goldman found in Graymont's favor on the failure to provide information

[1] In accordance with Fed. R. App. P. 30 and Circuit Rule 30, Graymont has filed herewith its Joint Appendix. References to the Joint Appendix are designated by "JA" followed by the appropriate page number(s).

allegation. (*Id.*) Graymont timely filed exceptions to the portion of the ALJ's decision regarding the purported failure to bargain over the rule changes, and the Board, by and through its General Counsel, timely filed cross-exceptions to the ALJ's recommended dismissal of the failure to provide information allegations. (JA485-494.)

On June 29, 2016, a panel of the Board—consisting of Chairman Pearce and Members Miscimarra, Hirozawa, and McFerran—issued its Decision and Order finding that Graymont violated Sections 8(a)(1) and (5) of the Act by unilaterally changing its work rules, absenteeism policy, and progressive discipline schedule. (JA495-524.) In addition, the Board rejected the ALJ's proposed ruling on the failure to provide information allegation and found that Graymont violated the Act by failing to timely inform the Union that it did not possess any documents responsive to the Union's request. (*Id.*) Member Miscimarra dissented to both portions of the Board's Decision and Order. (JA503-07.) Graymont timely sought review of the Board's Decision and Order in this Court. In response to Graymont's Petition for Review, the Board filed a cross-application for enforcement of the Board's Decision and Order, which the Court consolidated with the present case.

B. Statement of Relevant Facts

1. Graymont's Operations and Bargaining History

Graymont is engaged primarily in the business of mining limestone and

manufacturing lime products. (JA66, 122.) Graymont operates two lime production plants in the Pennsylvania area – one in Pleasant Gap and one in Bellefonte. (JA63-64, 122.) The Pleasant Gap and Bellefonte facilities, collectively, consist of about 150 employees, approximately 120 of whom are bargaining unit employees represented by the Union. (JA64, 123.) The most recent collective bargaining agreement between the parties went into effect June 1, 2014 and expires on May 31, 2017 (the "CBA"). (JA64-65, 140.) The effective dates of the parties' three previous CBAs were June 1, 2011 to May 31, 2014 (the "2011-2014 CBA"), June 1, 2006 to May 31, 2011 (the "2006-2011 CBA"), and June 1, 2001 to May 31, 2006 (the "2001-2006 CBA"), respectively. (JA65, 199-253, 339-75, 407-52.)

For at least 20 years, Graymont has maintained a set of work rules for the Pleasant Gap and Bellefonte facilities. (JA67-68, 254, 258.) The work rules are organized into three categories – Group A, Group B, and Group C – according to the seriousness of the related offenses. (JA254-258.) Group A infractions are the least serious, generally resulting in progressive discipline (beginning with a written warning) for the first, second and third violations, while Group C infractions are the most serious and may result in immediate discharge for the first offense. (JA254-58, 260-62.) Until 2005, the work rules also contained a "Policy on Absenteeism," which stated, in general terms, that if an employee was "habitually

absent," Graymont would notify the employee and the Union in writing that the employee's attendance was "unsatisfactory and unacceptable." (JA67-68, 254-58.) The policy further provided that continued poor attendance would result in the employee's probation and eventual discharge. (JA254-58.) Beginning in 2003 and throughout 2004, Graymont and the Union engaged in various discussions regarding the need to revise the absenteeism policy to provide more certainty and consistency with respect to employee attendance expectations. (JA156-57, 457.) At that time, the management rights language between the parties consisted of the following single sentence: "All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain exclusively vested in the Company." (JA97, 340.)

In 2005, following discussion with and input from the Union, Graymont revised the "Policy on Absenteeism" to make it a standalone document that set forth a disciplinary progression based on the number of occurrences of unexcused absence (the "2005 Absenteeism Policy"). (JA146, 156-57, 259.) The 2005 Absenteeism Policy provided that formal discipline would commence after the employee accumulated six (6) occurrences of unexcused absence. Upon reaching nine (9) occurrences within a twelve (12) month period, the employee received a "last chance notice," which remained in effect for twenty-four (24) months from the date of the ninth incident. (JA259, 457.) The 2005 Absenteeism Policy

remained in place until it was revised in March 2014 (*see infra*). (JA144, 157, 458.)

2. The Parties Negotiate and Agree to an Expanded Management Rights Clause During the 2006 Negotiations

In April of 2006, during the negotiations for the 2006-2011 CBA, Graymont proposed a significantly expanded management rights clause for inclusion in the new contract. (JA158, 163, 175, 389.) The parties then negotiated over Graymont's proposal, and agreed to several changes to the language originally proposed by Graymont. (JA158, 160, 175, 384-89.) After negotiating over the language of a number of specific provisions, the Union agreed to significantly expanded management rights language proposed by Graymont. (JA66-67, 387-88.) The new management rights clause – which specifically reserves to Graymont, among other things, the right "***to discipline and discharge for just cause***, ***to adopt and enforce rules and regulations and policies and procedures***; ***to set and establish standards of performance for employees***" – was thereafter incorporated into the 2006-2011 CBA, and has remained in place, unchanged, in the parties' subsequent CBAs, since. (JA67, 103, 166, 175, 199-253, 408) (emphasis added).

3. Graymont's 2014 Changes to the Work Rules and Absenteeism Policy

Graymont decided in late 2013 that, based on its performance and

production goals for the upcoming 2014 year, it needed to implement several changes to the work rules and put into place a less lenient absenteeism policy. (JA133, 151.) Graymont informed the Union that it was planning to modify the work rules, and provided a draft of the proposed changes at a meeting it requested with the Union on February 14, 2014 (the "February 14, 2014 Policy Meeting"). (JA81-82, 106, 121, 128, 153.) Martin Turecky ("Turecky"), Graymont's Plant Manager and its spokesman at the February 14, 2014 Policy Meeting, testified that most of the proposed changes consisted of either clarifications to and/or general "cleaning-up" of existing rules, or re-categorization / removal of certain rules altogether. (JA126,) Specifically:

- Group A work rule 4 (which stated "Continued tardiness will not be permitted") was deleted. Tardiness was instead addressed in a separate policy added to the rules, which clarified that four or more tardies in a twelve-month period constituted a violation of Group A work rule 6 (poor work habits).
- Group A work rule 7 (dealing with "loafing") was deleted.
- Group A work rule 13 (now rule 11) was modified by deleting the phrase "shall be cause for disciplinary action."
- Group A work rule "penalties for infractions" was modified from "The following penalties for infractions of Group A rules will be imposed in one year's time from the last violation" to "The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations" but the specific progressive discipline penalties remained unchanged. That same modification was also included in the Group B provision dealing with the progressive discipline steps.
- Group C work rule 1 (dealing with insubordination) was modified by

deleting the phrase "and will subject the offender to discipline up to and including discharge."

- Group C work rule 7 (dealing with criminal convictions) was deleted.
- The specific call-in number listed in Group A work rule 1 (dealing with call-ins) was replaced with an instruction to "call the report off phone number assigned by [the employee's] supervisor," as the original number was no longer in use.
- A specific reference to Graymont's Code of Business Conduct and Ethics was added to the preamble to the rules. It stated: "This set of work rules is in no way conclusive. For example, the Code of Business Conduct and Ethics applies as well."
- The work rules relating to sleeping on the job and failure to follow proper lock out / tag out procedures were moved from Group C to Group B.

(JA126, 145, 254-58, 260-62.) Additionally, Graymont added the following to the proposed rules: "NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document." This phrase was followed by matrix exactly how different Group A and Group B violations would be combined to determine the appropriate disciplinary penalty. (JA122, 149, 151, 254-58, 260-62.)

With respect to the 2005 Absenteeism Policy (which, at that time, existed as a separate document), Graymont proposed integrating the policy into the work rules and revising the language to allow for one unexcused absence (as opposed to six) before progressive discipline would be issued. (JA123-24, 260-62.) Any further unexcused absences would be regarded as a violation of Group A work rule 6 (poor work habits). (JA260-62.) The parties stipulated at the hearing that

Graymont's changes to the 2005 Absenteeism Policy are "material and substantial." (JA55.)

At the February 14, 2014 Policy Meeting, Turecky informed the Union that the revised rules would be implemented on March 1, 2014, and invited the Union to share any comments it might have. (JA82, 128-29.) After a brief caucus, the Union returned to the meeting and Union President Dan Ripka ("Ripka") stated that the Union would not comment on the work rules and instead, was filing a first step grievance with respect their implementation. (JA82-83, 106, 129, 263.) The meeting ended shortly thereafter. (JA129.) However, later that day, the Union informed Turecky that it wanted to "discuss the rules" after all and that the Union was withdrawing its first step verbal grievance. (JA83-84, 106-07, 130.) Turecky agreed, and the parties scheduled a follow-up meeting to take place on February 25, 2014 (the "February 25, 2014 Policy Meeting"). (JA83-84, 130.)

Approximately a week before the February 25, 2014 Policy Meeting, Graymont received a letter from the Union requesting copies of memos, data and any other materials upon which Graymont had "relied" in deciding to revise the work rules and 2005 Absenteeism Policy, minutes from any policy meeting in the past five years at which work rules, the 2005 Absenteeism Policy and/or discipline had been discussed, and any decisions or agreements reached between the parties regarding same (the "February 17, 2014 Information Request"). (JA85, 130, 264.)

The parties met as planned on February 25, 2014. (JA85, 107, 117, 266.) Turecky opened the meeting by presenting Graymont's letter of response to the Union's information request, which stated that because the parties' then-current collective bargaining agreement reserved to Graymont the sole and exclusive right to "adopt and enforce rules and regulations and policies and procedures," Graymont had no duty to bargain over the rules modifications and therefore, no duty to provide the requested information.[2] (JA88-89, 107, 118, 130-31, 265.) Turecky also explained, as stated in the response letter, that the Union already had copies of all the policy meeting minutes, since Graymont, as a matter of course, sends copies of the minutes to the Union after each policy meeting. (JA107, 134-35, 267.) The response letter also requested that the Union furnish to Graymont copies of any documents indicating that the parties had any agreements which would prevent or limit Graymont's right to adopt changes in policies. (JA265.)

[2] Although not raised by Graymont at the time, Graymont did not (and does not) possess any information responsive to the Union's request. Turecky testified during the hearing that Graymont had not relied on any summary discipline and/or attendance reports in making its decision to modify the rules. (JA132.) Nor had any documents containing production capacity predictions or relating to any performance-related programs been reviewed in connection with preparing the proposed changes. (JA133-34.) Graymont notified the Union regarding the lack of responsive information in August 2014 and explained that the work rules had been changed simply because Graymont felt that they would be a better way to run the business. (JA115.)

After explaining Graymont's response to the information request, Turecky invited the Union to share any concerns it had regarding the revised work rules and absenteeism policy. (JA85-86, 107, 119, 131, 136.) In response to the Union's comments, Graymont agreed to make several changes to the proposed work rules, including removal of the word "normally" from the discipline resetting provisions and elimination of the rule prohibiting "unauthorized use" of Graymont's phones entirely. (JA108-09, 137.) Turecky then informed the Union that Graymont would be proceeding with the implementation of the revised work rules on March 1, 2014, as originally planned. (JA137-38.) The Union received a final revised draft of the new rules from Graymont on February 27, 2014. (JA89-90.) This version – which incorporated the changes proposed by Graymont at the February 14, 2014 Policy Meeting, as well as the revisions Graymont agreed to at the February 25, 2014 Policy Meeting – was implemented effective March 1, 2014. (JA90, 120, 139-40, 267.)

SUMMARY OF ARGUMENT

The Board's decision rests on an incorrect application of the law that is wholly inconsistent with this Court's long-standing precedent. While work rules, absenteeism policies, and progressive discipline schedules may be mandatory subjects of bargaining, there is no need to bargain over changes to such rules where, as here, the parties have negotiated a CBA that addresses how these issues

will be handled. *NLRB v. United States Postal Service*, 8 F.3d 832, 833-834, 836 (D.C. Cir. 1993). In such a situation, the Union's bargaining rights regarding that subject have been fully exercised for the life of the agreement. *See Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed. App'x 11, 12-13 (D.C. Cir. May 3, 2016). "[I]f a subject is covered by the contract, then the employer generally has no ongoing obligation to bargain with its employees about that subject during the life of the agreement." *Id.* The Board chose to ignore this well settled precedent in favor of its "clear and unmistakable waiver" analysis. The "Board's refusal to adhere to [this Court's] precedent dooms its decision before this [C]ourt." *Id.*

The management rights provision in the parties' CBA reserves for Graymont the right to "manage; [and] direct its employees," "discipline and discharge for just cause," "adopt and enforce rules and regulations and policies and procedures," and "set and establish standards of performance for employees." (JA408.) The actions taken by Graymont which are the subject of this proceeding—modifying its work rules, absenteeism policies and progressive discipline schedule—fall squarely within these categories of rights ceded to Graymont by the Union. Thus, the Union exercised its right to bargain with respect to these matters and there was no need for Graymont to bargain further with the Union—or comply with the Union's request for information—prior to taking the action it did.

While the contract coverage standard is the correct test, the outcome would

not change under the Board's clear and unmistakable waiver standard. Under the waiver standard, a clear and unmistakable waiver of rights exists where the bargaining partners "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). In assessing whether a contract expresses such intention, rights reserved for the employer in the contract's management rights provisions must be read in conjunction with one another. *Baptist Hospital of E. Tenn.*, 351 NLRB 71, 73 (2007). Here, the plain language of the management rights provision agreed to by the Union authorized Graymont to make changes to its work rules, absenteeism policy, and progressive discipline schedule and, as such, amounted to a clear and unmistakable waiver of the Union's right to bargain over such changes.

Because Graymont is free to unilaterally act under both the contract coverage and the clear and unmistakable waiver standards, it follows that Graymont also was under no obligation to respond to the Union's request for information. Even if Graymont was obligated to respond, Graymont could not be liable for violating of Section 8(a)(5) by failing to timely respond to the Union's request because the General Counsel never amended its complaint to assert such a claim. Under the well-settled precedent established in *Raley's Supermarkets and Drug Centers*, 349 NLRB 26 (2007), the General Counsel's failure to amend its

complaint to assert a timeliness claim precludes an adverse finding on this issue.

Furthermore, the Board's decision to overturn *Raley's Supermarkets* and apply the standard set forth in *Pergament United Sales, Inc.*, 296 NLRB 333 (1989) improperly departs from established precedent without reasoned justification. *Raley's Supermarkets* and *Pergament* are intended to address entirely different scenarios. However, there also would be no violation under *Pergament*, which the Board asserts enables it to "find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Id.* at 335. This standard is not met here because the timeliness of Graymont's response was not fully litigated and is unrelated to the asserted issue of whether Graymont had an obligation to respond to the Union's request. Finally, the *Pergament* standard does not extend to Graymont because this Court is opposed to retroactive application of new Board rules "[u]nless the burden of imposing the new standard is *de minimis* or the newly discovered statutory design compels retroactive application." *Retail, Whole & Dept. Store Union v. NLRB*¸ 446 F.3d 380, 390 (D.C. Cir. 1972). Neither requirement is met in this case. Accordingly, Graymont requests that this Court deny enforcement of the Board's Decision and Order and dismiss this case.

STATEMENT OF STANDING

Graymont is an "aggrieved" party within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f), and thus has standing under that section to seek review of the Board's final order in this Court.

ARGUMENT

A. Standard of Review

Judicial review of Board decisions is deferential but by no means is it a rubber stamp. *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445 (D.C. Cir. 2004). This Court will set aside a Board decision "when it has no reasonable basis in law, fails to apply the proper legal standards, or departs from established precedent without reasoned justification." *Jochims v. NLRB*, 480 F. 3d 1161, 1167 (D.C. Cir. 2007) (citing *Titanium Metals Corp.*, 392 F.3d at 446). Where the Board's actions are either incompatible with the terms or purposes of the Act or in conflict with established precedent, the Court is "obliged to intervene." *Dep't of Navy v. FLRA*, 962 F.2d 48, 53 (D.C. Cir. 1992). The Board must adhere to the Court's established precedent if it desires enforcement of its decisions. *Heartland*, 650 Fed. App'x at 12-13.

In cases, such as this one, that involve interpretation of a collective bargaining agreement, the Court reviews the contract language *de novo*. *Id.*; *see also Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005) (federal courts

do "not defer to the Board's interpretation of a collective bargaining agreement"); *U.S. Postal Serv.*, 8 F.3d at 838 ("we accord no deference to the Board's interpretation of labor contracts") (citation omitted).

The Board's factual findings must be supported by "substantial evidence." 29 U.S.C. §160(f). The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998). The Court must assess the "whole record" and must consider not only the evidence supporting the Board's decision but also whatever in the record fairly detracts from its weight. *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013) (citation omitted).

B. Discussion of Issues

1. The Board Erred By Applying Its Clear and Unmistakable Waiver Standard Rather Than the Contract Coverage Standard Used By This Court

This case presents yet another instance of the Board's obdurate refusal to adhere to this Court's well-established precedent regarding the proper legal standard for determining whether an employer violates the Act by refusing to bargain with its union over matters as to which the employer claims to possess authority under the parties' collective bargaining agreement. As reiterated just several months ago, this Court has repeatedly held that "the proper inquiry [in such

cases] is simply whether the subject that is the focus of the dispute is "covered by" the agreement. *Heartland*, 650 Fed. App'x at *12-13. If the parties addressed the subject in their collective bargaining agreement, "then the employer generally has no ongoing obligation to bargain with its employees about that subject during the life of the agreement. *Id.* (citing *U.S. Postal Serv.*, 8 F.3d at 836-37). This standard has been the established precedent of this Court for more than two decades, *see id.*; *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008); *Enloe*, 433 F.3d at 835; *U.S. Postal Serv.*, 8 F.3d at 836-37; *Dept. of Navy*, 962 F.2d at 56-57, and is followed by at least two other Circuits, *see Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F. 3d 14, 25 (1st Cir. 2007); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936-37 (7th Cir. 1992).

Notwithstanding this clear and longstanding precedent, the Board in this case consciously refused to apply the contract coverage standard, stating simply that "we reject it and adhere to the Board's long-established 'clear and unmistakable waiver' standard…." (JA 497, n.11) (citation omitted).[3] The Board

[3] In its Decision and Order, the Board stated that Graymont's assertion that the Board should apply the contract coverage standard rather than the waiver standard was untimely because it was first raised in Graymont's exceptions brief to the Board. (JA 497, n.11). The Board immediately went on to state, however, that even if the assertion had been timely raised, it would be rejected because the Board intended to adhere to the "long-established" waiver doctrine. *Id.* Graymont did not waive its right to challenge the Board's refusal to apply the contract coverage standard by first raising that challenge to the Board rather than the ALJ. At the outset, the ALJ was bound to apply existing Board law and was without any

found that, because the provisions of the CBA relied upon by Graymont did not "specifically reference work rules, absenteeism, or progressive discipline," the Union did not clearly and unmistakably waive its right to bargain over those subjects and Graymont violated the Act by refusing to do so. *Id.* at 497. As explained many times by this Court, the Board's approach is improper because it imposes "an artificially high burden" of specificity on employers and ignores the reality that collective bargaining agreements establish "principles to govern a myriad of fact patterns." *Enloe*, 433 F.3d at 835; *U.S. Postal Serv.*, 8 F.3d at 836-37; *Dept. of the Navy*, 962 F.2d at 56-57. The Board made no attempt in this case to analyze Graymont's actions under the contract coverage standard. By failing to do so, the Board "doom[ed] its decision before this [C]ourt." *Heartland*, 650 Fed. App'x at *13.

2. The CBA Gives Graymont the Right to Unilaterally Modify Its Work Rules, Absenteeism Policy, and Progressive Discipline Schedule

Under the "contract coverage" standard, the relevant inquiry is whether the subject as to which the employer claims a right to act unilaterally is "within the

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authority to change it, a precept the ALJ himself acknowledged in his decision. (JA 479 (*citing Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.")). Thus, raising the issue before the ALJ would have been a pointless exercise. Moreover, so long as the issue was clearly raised before the Board, as it was in this case, it is preserved for review. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1174-75 (D.C. Cir. 1993).

compass" of the language negotiated by the parties and included in their collective bargaining agreement. *U.S. Postal Serv.*, 8 F.3d at 838. An unduly high degree of specificity, appropriate for the "clear and unmistakable waiver" standard, is not required. *Id.* (rejecting "crabbed reading of the 'waiver'/'covered by' distinction). *See also Bath Marine Draftsmen's Ass'n*, 475 F. 3d at 25 (consider whether the parties bargained over the mandatory subject at issue); *Chicago Tribune Co.*, 974 F.2d at 937 (union relinquishes bargaining rights as to "subjects comprehended by the management rights clause, by agreeing to the clause"); *Baptist Hosp. of E. Tenn.*, 351 NLRB at 72 n.7 (under contract coverage test, cannot be a refusal to bargain "where there is a contract clause that is relevant to the dispute"). Determining whether the subject of the dispute is covered by the parties' collective bargaining agreement is a matter of ordinary contract interpretation. *Enloe*, 433 F.3d at 839.

Here, there can be no dispute that the work rules modifications at issue in this case fall squarely within the management rights language negotiated by Graymont and the Union. In particular, the CBA reserves to Graymont the "sole and exclusive rights" to, among other things, "manage," "direct its employees," "discipline and discharge for just cause," "adopt and enforce rules and regulations and policies and procedures," and "set and establish standards of performance for employees." (JA408.) On its face this language accords Graymont the right,

without exception, to set and establish standards of performance and to adopt rules and regulations and policies and procedures with respect to its employees. Graymont's March 2014 revisions to its work rules, absenteeism policy, and progressive discipline schedule, plainly involved "establish[ing] standards of performance" and "adopt[ing] rules and regulations and policies and procedures." Moreover, there was nothing remarkable about Graymont's exercise of its management rights in this case – rules relating to tardiness, absenteeism and progressive discipline are the grist of the management rights mill. The Board cites to no contractual language or bargaining history that would show that the parties intended to take the unusual step of carving out rules relating to tardiness, absenteeism and progressive discipline from the normal operation of the management rights clause. To the contrary, the record establishes that when Graymont and the Union were negotiating over the management rights clause, the Union was clear about the things it wanted removed. (JA158, 160, 175, 384-89.) As noted by Member Miscimarra in his dissent to the Board's decision in this case, "[n]o reasonable person reading this language could conclude that Graymont's right of unilateral action extended to rules, regulations, policies and procedures concerning some matters but not others." *Graymont*, 364 NLRB No. 37, *12 (2016) (Miscimarra, dissenting) (JA506).

The CBA in this case preserves Graymont's general authority to discipline,

promulgate rules, regulations, policies and procedures, and institute performance standards. The grant of authority to Graymont is quite broad, but the scope of the grant reinforces the conclusion that Graymont's actions were covered by the CBA. The Seventh Circuit, in *Chicago Tribune*, aptly summarized the point this way:

> [T]he breadth of a contractual provision need not detract from the clarity of its meaning. Indeed, a management rights clause can be drawn so broadly as to leave no doubt that a particular regulation was intended to be within its scope. Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators.

974 F.2d at 937 (citations omitted). Such is the case here. The work rule and policy changes at issue are clearly within the scope of the broad management rights clause negotiated by Graymont and the Union. Thus, the Union has already exercised its bargaining rights and the Board is not free to set aside the bargain because the Union would like to negotiate a better one.

3. Even Under the Waiver Doctrine, the CBA Clearly and Unambiguously Gave Graymont the Right to Make Unilateral Changes to Its Policies

Even though the contract coverage standard was the proper standard to apply,[4] the outcome does not change under the Board's waiver analysis. Under the waiver analysis, a "clear and unmistakable waiver" of rights exists where

[4] The Board is free to apply its waiver analysis, however, it may not do so to the exclusion of the contract coverage analysis. *Enloe*, 433 F.3d at 837-38. *See also* Heartland Plymouth Court MI, LLC v. NLRB, 2016 U.S. App. LEXIS 17688, *4 n.1 (D.C. Cir. Sept. 30, 2016) (question of contract coverage is antecedent to waiver question).

"bargaining partners . . . unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena*, 350 NLRB at 811. A waiver of a bargaining right may also be inferred based on the parties' past practice or from a combination of the express provisions of the CBA and the parties' past practice. *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992). Where, as here, the management rights clause grants the employer the authority to take a particular action, the Board has routinely found such language to constitute a clear and unmistakable waiver of a union's right to bargain over that subject. *See e.g., Baptist Hosp. of E. Tenn.*, 351 NLRB at 73; *Provena*, 350 NLRB at 815; *Caraustar Mill Group*, 339 NLRB 1079, 1083 (2003); *United Technologies Corp.*, 287 NLRB 198, 198 (1987).

In the present case, the Board erred by employing an unduly narrow reading of precedent it sought to distinguish and ignoring other applicable precedent altogether. The Board incorrectly concluded that the Union had not clearly and unmistakably waived its right to bargain over changes to the work rules, absenteeism policy, and progressive discipline schedule by agreeing to the expanded management rights clause because the clause did not specifically define the different types of rules and policies to which the management rights clause applied. (JA503-07.) This is a "strained and constricted interpretation" of the

facially clear language of the management rights clause and one that ignores the fundamental rule of contract construction that the parties' mutual intent must be gleaned from the contract as a whole. *Baptist Hosp. of E. Tenn.*, 351 NLRB at 73; *see also*, Elkouri & Elkouri, HOW ARBITRATION WORKS § 9.3.A.viii (BNA 7th ed. 2012).

In *Baptist Hospital of East Tennessee*, a case Graymont cited to the Board but the Board chose not to discuss, the Board found that the union had clearly and unmistakably waived its right to bargain over the employer's unilateral changes to its holiday schedule policy by agreeing to a management rights clause that allowed the employer to "determine and change starting times, quitting times and shifts." 351 NLRB at 74. Although there were no specific references to "schedule," "scheduling" or "holidays" in the management rights clause, the Board found that "the language must be read, in conjunction with the other management rights to 'assign employees' and 'determine or change methods and means' of conducting operations, to also encompass the scheduling of employees and work shifts. The lesser right [of holiday scheduling] is necessarily included in the more general right granted by [the management rights clause]." *Id.* at 73.

Here, the broad rights reserved to Graymont—i.e., "to adopt and enforce rules and regulations and policies and procedures"—demonstrate the parties' intent to reserve to Graymont a "general right" to establish rules and policies addressing

any and all employee conduct, including Graymont's "lesser rights" with respect to attendance and discipline. (JA408.) When read "in conjunction" (as the *Baptist Hospital of East Tennessee* Board instructs) with the other rights enumerated in the clause – "to discipline and discharge for just cause" and "to set and establish standards of performance for employees" – Graymont's contractual privilege to act unilaterally with respect to its work rules, attendance policy and progressive discipline schedule could hardly be clearer.

This conclusion is supported the Board's holding in *United Technologies*, 287 NLRB at 198. In *United Technologies*, the management rights clause gave the employer the "sole right and responsibility to direct the operations of the company and in this connection . . . to select, hire, and demote employees, *including the right to make and apply rules and regulations for production, discipline*, efficiency, and safety. *Id.* (emphasis in original). The Board found that the employer's unilateral modification of the progressive discipline steps under its attendance policy did not violate Section 8(a)(5) of the Act because the Union had waived its rights to bargain over this change. *Id.* at 205. The "contract language plainly grant[ed] the [r]espondent the right to unilaterally make and apply rules for discipline" and there was nothing in the parties' bargaining history to indicate that the language was "intended to mean something other than that which it plainly state[d]." *Id.* at 198.

Similarly, here, the management rights clause reserves for Graymont the sole and exclusive right to, among other things, "set and establish standards of performance." (JA408.) The March 2014 changes to Graymont's policies—concerning tardiness, absenteeism, and progressive discipline procedures—inherently involve the setting and establishing of standards of performance and there is nothing in the bargaining history to suggest that the language should mean anything other than what it says.

The Board sought to distinguish *United Technologies* on the basis that the clause of the management rights provision relating to rules specified the employer's right to make and apply rules "*for* production, *discipline*, efficiency and safety" whereas the rules clause in the instant case does not specifically reference discipline. (JA497) (emphasis in original). The distinction is unpersuasive for several reasons. First, the management rights provision at issue in this case *does* grant to Graymont the right to discipline in one clause and the right to make rules in another. The fact that the two clauses are not combined into a single clause does not make it less clear that Graymont retained (and the Union waived) the right to make rules pertaining to discipline. Second, as noted by Member Miscimarra in his dissent, the provision also accords Graymont the right to "set and establish standards of performance," a right that was not contained in the *United Technologies* provision. (JA504.) Thus, even if the rules clause of

Graymont's management rights provision lacked sufficient clarity (it does not), the standards of performance clause more than picked up the slack. Finally, the Board's interpretation of the management rights clause results in the clause becoming a nullity – because the parties did not list the specific types of rules Graymont retained the right to make, it retained no right to make rules. This is an unreasonable interpretation plainly at odds with the parties' intent. *See also Provena*, 350 NLRB at 809 (management rights clause granting right to "make and enforce rules of conduct" and "to suspend, discipline and discharge employees" constituted waiver of union's right to bargain over attendance policy changes).

The management rights provision in the parties' CBA plainly authorized Graymont to make the changes to it work rules and attendance and progressive discipline policies at issue in this case. By agreeing to this provision, the Union clearly and unmistakably waived its right to bargain over such changes. Accordingly, even under the Board's waiver analysis, properly applied, Graymont was free unilaterally revise its work rules, absenteeism policy, and progressive discipline schedule.

4. Graymont Had No Duty To Bargain Over Changes to Its Policies That Were Not Material, Substantial, or Significant.

Even in the absence of a waiver, it is settled law that not every unilateral change of a work rule constitutes a breach of the employer's bargaining obligation under Section 8(a)(5). *Peerless Food Products, Inc.*, 236 NLRB 161, 161 (1978).

The mere fact that a change may be to the disadvantage of certain employees does not give rise to a bargaining duty. *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005). Rather, to establish a violation, the particular change must be "material, substantial and significant." *Fresno Bee*, 339 NLRB 1214, 1215 (2003) (finding changes in payroll period and overtime assignment to be "*de minimis*"); *Berkshire Nursing*, 345 NLRB at 220-221 (change to parking lot policy that increased walking time from 1 minute to 3-5 minutes was not "material, substantial, or significant"). The Board's decision completely ignores this settled point of law and contains no analysis of whether Graymont's modifications were "material, substantial, and significant." The Board assumes without any support or explanation that this is the case. This assumption is flawed.

The record evidence demonstrates many of the modifications at issue are not changes at all, but are rather clarifications of existing rules.[5] Such changes are *de minimis* and do not require bargaining. *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 964-964 (D.C. Cir. 2005) (reassignment of four parking spaces previously reserved for ALJs was *de minimis* and did not require bargaining); *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 716 (1992) ("[M]ere

[5] As discussed above, the parties stipulated that the changes to the 2005 Absenteeism Policy were material and substantial (JA55); as to those changes, Graymont relies on its argument that such changes are clearly covered by the parties' CBA.

particularizations of, or delineations of means for carrying out, an established rule or practice" do not rise to the level requiring bargaining). For example, Graymont's recalibration of the rules pertaining to tardiness falls squarely within this exception. Graymont had always maintained a rule addressing "continued tardiness," which was simply restyled in March 2014 as a separate "Policy on Tardiness" and clarified to define "continued tardiness" as more than three incidents of lateness in any twelve month period. However, chronic tardiness remained a Group A violation, the penalties for which were not changed.

Likewise, the deletions of the phrase "shall be cause for disciplinary action" from Group A, work rule 13 (now rule 11) and the phrase "and will subject the offender to discipline up to and including discharge" from Group C, work rule 1, eliminated unnecessary, redundant language (as discipline for such infractions is provided for elsewhere in the rules) but did not in any way change the substance of those rules. (JA254-58, 267-69.)

Other changes, such as updating the telephone number to be used for reporting absences (Group A, work rule 2) were insignificant and technical, and can only be described as *de minimis*. And still others – including the deletions of work rule 7 from Group A and work rule 7 from Group C, as well as the reclassifying of Group C, work rule 4 (sleeping) and work rule 11 (lock out / tag out procedures) as Group B violations, thereby lessening the penalty for such

infractions – actually benefited employees, rather than putting them at any kind of disadvantage. Thus, the Board's presumption that all of the work rule changes were "material, substantial, and significant" without any discussion regarding the basis for this determination is at odds with this Court's precedent and provides yet another basis for rejecting the Board's decision.

5. Graymont's Response To The Union's Request For Information Was Lawful

a. Graymont Was Not Obligated To Respond To The Union's Request For Information

Graymont was under no obligation to respond to the Union's request for information because—as explained above—Graymont was free to unilaterally modify its work rules. Although Section 8(a)(5) creates a duty to bargain collectively, "[a] union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under [Section 8(a)(5)] turns upon 'the circumstances of the particular case.'" *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-15 (1979). Here, because Graymont retained the right to make these changes without bargaining over them, it had no obligation to provide the Union with requested information relating to such changes. Accordingly, the Board's decision to overrule *Raley's Supermarkets*, is of no import and the allegations as to Graymont's failure to timely provide the Union with the requested information

should be dismissed.

b. The Board Erred By Overruling *Raley's Supermarkets*

Notwithstanding the fact that Graymont was not obligated to respond to the Union's request for information, the Board erred by overruling *Raley's Supermarkets* and reversing the ALJ's finding that Graymont did not violate the Act. *Id.* at 28. *Raley's Supermarkets* held that where there is an allegation that the respondent failed to furnish information, or unreasonably delayed in furnishing information, to the Union, and the General Counsel learns prior to trial that the information does not exist, he must amend the complaint to allege that the Respondent violated the Act by failing to timely inform the Union that the information does not exist. *Id.* This narrow standard was well-settled prior to the Board's decision. *See, e.g., DMS Facility Servs.*, 2016 NLRB LEXIS 215, *46 n.17 (NLRB Mar. 18, 2016) (noting that the complaint did not allege that the Respondent unreasonably delayed in informing the Union that it had no employee evaluations, and therefore declining to find a violation).

The Board now seeks to abandon *Raley's Supermarkets* in favor of the test established in *Pergament*, 296 NLRB at 334. In *Pergament*, the Board held that it was authorized to "find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Id.* The Board's asserted basis for

overturning *Raley's Supermarkets*—namely that *Raley's Supermarkets* did not articulate a rationale for implicitly carving out an exception to the *Pergament* test and that a single test is preferable—is flawed.

The Board's reasoning ignores the fact that *Raley's Supermarkets* and *Pergament* address distinctly different scenarios. In *Raley's Supermarkets*, the Board was confronted with the limited circumstance in which General Counsel fails to amend its complaint in request for information cases. In such situations, the Board found that it would be "an unreasonable stretch" to convert a failure to provide documentation allegation into an allegation "that [responsive documents do] not exist and that the Respondent failed to inform the Union of this fact." *Raley's Supermarkets*, 349 NLRB at 28. This holding is rooted in the fact that such claims intrinsically involve disparate facts and defenses. Thus, a more exacting pleading standard is required to avoid a due process violation.

In contrast, *Pergament* addressed the more common scenario in which the General Counsel finds an unalleged violation based on facts that are closely connected to the subject matter of the complaint. 296 NLRB at 334. In *Pergament*, the complaint alleged a Section 8(a)(3) violation only (failure to hire based on union membership) but the evidence adduced at the hearing supported a separate violation of Section 8(a)(4) (failure to hire based on filing a charge). *Id.* at 335. The Board found that the Section 8(a)(3) allegations asserted in the

complaint and the newly asserted Section 8(a)(4) allegations "focus on the same set of facts, i.e., the lawfulness of the Respondent's motivation for failing to hire the employees." *Id.* Thus, unlike the factually distinct claims in *Raley's Supermarkets*, the Section 8(a)(3) and (4) allegations were closely related and specific pleading was not necessary. Accordingly, as *Raley's Supermarkets* and *Pergament* address materially different scenarios, the Board's decision to overrule *Raley's Supermarkets* was without reasoned justification and should be rejected by this Court.

c. Even Under The *Pergament* Standard, The Board Erred By Finding A Violation Because The Claims Were Not Closely Connected Or Fully Litigated

Even under the *Pergament* standard, the Board's ruling is flawed because the requirements set forth in *Pergament* are not satisfied here. As noted above, *Pergament* provides that "the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Id.* at 335. Neither requirement is satisfied here.

Claims are not "closely connected" where the legal violation found by the Board raised entirely different issues from the legal violation charged. *Champion Int'l Corp.*, 339 NLRB 672, 673 (2003) (distinguishing *Pergament*, and finding a due process violation where the alleged and actual violations differed

substantially). In *Champion Int'l*, the Board refused to find a direct dealing violation where the complaint only alleged a unilateral change. *Id.* The Board noted the differences between these allegations. In particular, a unilateral change allegation involves a change in the terms and conditions of employment, while direct dealing involves dealing with the employees directly about a mandatory subject of bargaining and does not depend on whether there has been a change. *Id.* Accordingly, the Board held that *Pergament* did not apply because "the change itself and the direct dealing are two different things, and the allegations and defenses are different." *Id.*

In the instant case, the issue alleged in both the complaint and the post hearing amendment to the complaint (i.e., whether Graymont had an obligation to respond to the Union's request for information) is distinct from the violation found by the Board (i.e., the timeliness of Graymont's informing the union that no responsive information existed). The former assumes the requested information does exist, while the latter assumes the information does not exist and focuses on different factual issues relating to when the employer learned the information did not exist and the impact the delay had on the Union. Like the claims at issue in *Champion Int'l*, the factual allegations and legal defenses for these claims are distinct. Thus, it follows that the issues are not "closely connected" and that the *Pergament* standard does not apply.

The record evidence further demonstrates that the General Counsel's failure to amend the complaint precluded the parties from fully litigating the timeliness issue. It is "axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." *Id.* at 673; *Piqua Steel Co.*, 329 NLRB 704, 704 n.4 (1999) (holding that unlawful discharge "theory was neither alleged nor litigated, and we therefore find that it is not properly before us"). This is because the failure to notify the respondent of the asserted claims precludes the respondent from mounting a defense. *See Dalton Sch.*, 364 NLRB No. 18, *7 (2016) ("Respondent did not have notice that the facts pertaining the March 11 meeting would be used to prove a separate interrogation violation, and therefore the Respondent did not have an opportunity to mount a defense.").

The General Counsel did not announce its intention to assert a violation regarding the timeliness of Graymont's response to the Union's request for information until after the September 2014 hearing. (JA454.) And, even then, the violation asserted was that Graymont violated the Act by its unreasonable delay in providing the requested information, not that it waited too long to inform the Union that it had no responsive information. (*Id.* at n.2.) Graymont, therefore, did not have the opportunity to fully litigate the timeliness of its response. If the General Counsel had amended its complaint to include these allegations sooner, Graymont would have altered its conduct at the hearing—i.e., by introducing

evidence as to the timeliness issue. *Springfield Day Nursery*, 362 NLRB No. 30, *9-10 (2015) (Whether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made"). This fact alone demonstrates that the timeliness issue was not fully litigated. Moreover, contrary to the Board's position, the limited testimony offered during the hearing regarding the timing of Graymont's response is insufficient to show that the timeliness issue has been fully litigated. *Dilling Mech. Contrs.*, 348 NLRB 98, 105 (2006) ("The presentation of evidence associated with an alleged claim . . . is insufficient to put the parties on notice that another, unalleged claim (for which that evidence might also be probative) is being litigated, especially where the two claims rely on different theories of liability."). Therefore, the "closely connected" and "fully litigated" requirements of the *Pergament* standard are not satisfied, and the Board should dismiss this claim in its entirety.

d. The *Pergament* Standard Should Not Be Applied Retroactively to Graymont

Finally, even if the Court finds that *Pergament* is the appropriate standard moving forward, that standard should not apply retroactively to Graymont because doing so would result in a manifest injustice. In making this determination, this Court considers the following factors:

(1) whether the particular case is one of first impression, (2) whether

> the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390. However, where there is a departure from established Board precedent on which the respondent relied, prospective application of the new rule is appropriate, "[u]nless the burden of imposing the new standard is de minimis or the newly discovered statutory design compels its retroactive application." *See id.* at 392; *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (a new rule "may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule'"); *Lincoln Lutheran of Racine*, 362 NLRB No. 188, *39-40 (2015) (holding that prospective application of new rule changing longstanding substantive Board law was appropriate).

"[N]otions of equity and fairness" weigh heavily against retroactive application of the *Pergament* standard in this case. *Epilepsy Found.*, 268 F.3d at 1102. The Board's Decision and Order sets forth a new standard that is a departure from well settled precedent, in *Raley's Supermarkets*, which was directly on point to the instant case. Moreover, the newly established standard is not *de minimis* as the Board is seeking to require *Graymont* to post a public notice acknowledging unlawful conduct as to which it did not have a full and fair opportunity to defend

itself. Further, there is nothing in the new rule that requires retroactive application. Accordingly, because retroactive application of the Board's new *Pergament* standard would "work hardship upon [Graymont] altogether out of proportion with the public ends to be accomplished," it follows that retroactive application of the new *Pergament* standard is inappropriate here. *Retail, Wholesale*, 466 F.2d at 393 (citation omitted).

CONCLUSION

For the foregoing reasons, Graymont respectfully requests that the Board's decision be denied enforcement in its entirety.

Dated: November 8, 2016

Respectfully submitted,

By: /s/ Eugene A. Boyle

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 10,529 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 in Times New Roman, 14 point font.

Dated: November 8, 2016

/s/ Eugene A. Boyle
Counsel for Petitioner Graymont (PA) Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2016, I caused the foregoing CORRECTED BRIEF OF PETITIONER to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Eugene A. Boyle

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRAYMONT (PA) INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 16-1249
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
	)	
Respondent.	)	

UNPUBLISHED AUTHORITIES

1. *Heartland Plymouth Court MI, LLC v. NLRB*, 2016 U.S. App. LEXIS 17688 (D.C. Cir. Sept. 30, 2016)

2. Elkouri & Elkouri, HOW ARBITRATION WORKS § 9.3.A.viii (BNA 7th ed. 2012)

Neutral
As of: November 7, 2016 9:49 PM EST

Heartland Plymouth Court MI, LLC v. NLRB

United States Court of Appeals for the District of Columbia Circuit

September 30, 2016, Decided

No. 15-1034

Reporter
2016 U.S. App. LEXIS 17688; 207 L.R.R.M. 3321; 167 Lab. Cas. (CCH) P10,953

HEARTLAND PLYMOUTH COURT MI, LLC, DOING BUSINESS AS HEARTLAND HEALTH CARE CENTER - PLYMOUTH COURT, PETITIONER/CROSS-RESPONDENT v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT/CROSS-PETITIONER

Prior History: **[*1]** On Petitioner's Motion for Attorney Fees.

Heartland Plymouth Court MI, LLC v. NLRB, 650 Fed. Appx. 11, 2016 U.S. App. LEXIS 8164 (D.C. Cir., May 3, 2016)

Core Terms

nonacquiescence, bad faith, unmistakable, venue, agency's, coverage, cases, bargaining, circuits, attorney's fees, Merits, reply, en banc, reasons, sweeping, parties, split, decisions, petitions, courts, issues, motion for attorney fees, petition for review, majority opinion, cross-petitioned, intracircuit, litigating, acquiesce, opposing, requires

Case Summary

Overview
HOLDINGS: [1]-After petitioner employer obtained review of respondent NLRB's (Board) order and the order's enforcement was denied, the Board's nonacquiescence to the court's decision was improper because *29 U.S.C.S. § 160(f)* venue uncertainty did not excuse its less-than-candid representation of its disagreement with adverse circuit law, its failure to preserve its arguments for U.S. Supreme Court review, or its failure to seek certiorari review to achieve a national resolution; [2]-Its nonacquiescence was bad faith, authorizing an award of attorney fees under *28 U.S.C.S. § 2412(b)*, because it showed persistent nonacquiescence without candor or the pursuit of judicial finality and did not invoke its right to transfer the case to a more favorable court, and its obstinacy forced the employer to waste time and resources to obtain a result it knew the court's precedent would provide.

Outcome
Motion granted.

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN1 *29 U.S.C.S. § 160(f)* permits petitions to review the National Labor Relations Board's decisions to be filed in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein any aggrieved person resides or transacts business, or in the United States Court of Appeals for the District of Columbia.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

HN2 The goal of the National Labor Relations Board's (Board) policy of nonacquiescence is to achieve a uniform and orderly administration of a national act, such as the National Labor Relations Act. By determining whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the U.S. Supreme Court has ruled otherwise, the Board claims to ensure a nationally uniform labor policy. Understood in the most charitable light, not acquiescing to a given circuit's diverging legal interpretation until the Supreme Court has the last word puts two roles in harmony—the Board's role of national say in what labor law should be, and the judicial department's emphatic province and duty to say what the law is.

Administrative Law > Separation of Powers > Executive Controls

Administrative Law > Judicial Review

HN3 An agency's policy of nonacquiescence to a decision of a federal circuit court of appeals is divorced from its purpose when an agency asserts it with no stated intention of seeking certiorari.

Administrative Law > Judicial Review

Administrative Law > Separation of Powers > Executive Controls

HN4 When considering an agency's policy of nonacquiescence to a decision of a federal circuit court of appeal, achieving judicial finality through national uniformity requires nonacquiescence to rest on certain conditions. First, any nonacquiescence depends upon the agency actually seeking U.S. Supreme Court review of adverse decisions. Second, nonacquiescence requires candor in its application. The agency should clearly assert its nonacquiescence, specifying its arguments against adverse precedent to preserve them for Supreme Court review. These two conditions characterize proper nonacquiescence. In cases where an appeal implicates a statute's multi-venue provision, the reviewing court must assess a third condition: venue uncertainty. When an agency's assertion of venue uncertainty is plausible on the facts and proper nonacquiescence is otherwise pursued, the agency acts in good faith. But, when an agency's assertion of venue uncertainty is implausible on the facts, the situation is no different than intracircuit nonacquiescence—where the agency's conduct would constitute bad faith if its nonacquiescence is not clearly asserted and accompanied by a preservation of arguments for Supreme Court or en banc review.

Administrative Law > Separation of Powers > Executive Controls

Administrative Law > Judicial Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

HN5 When considering whether an agency acts in good faith in declining to acquiesce to the decision of a federal circuit court of appeal, intracircuit nonacquiescence is not the same as refusing to apply an adverse circuit's law due to an underlying statute's multi-venue provision. For example, when a party appeals an adverse National Labor Relations Board (Board) order under the National Labor Relations Act, the statute provides the appealing party with multiple venue options. *29 U.S.C.S. § 160(f)*. This uncertainty means, in some circumstances, the Board may have issued its order without knowing which circuit court ultimately will review its actions. In those circumstances, the Board's nonacquiescence to an adverse circuit's law is a function of ignorance, not defiance. There are, however, multiple instances when an agency's assertion of venue uncertainty is implausible, i.e., it knows that its order will be subjected to an adverse circuit's law on appeal. Two examples are: (1) when all courts of proper venue have adopted positions contrary to the agency's policy, and (2) when an order has been issued by an agency on remand from an adverse circuit court which retained jurisdiction over the action. In these cases, any nonacquiescence is necessarily intentional and, thus, of the intracircuit variety.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

Administrative Law > Judicial Review

Administrative Law > Separation of Powers > Executive Controls

HN6 When considering whether an agency acts in good faith in declining to acquiesce to the decision of a federal circuit court of appeal, when a case's facts result in only two venue choices for a party appealing an adverse order, and one circuit's precedent is in agreement with the agency's legal interpretation while the other is adverse to it, the agency knows any appeal will be to the adverse circuit. Furthermore, for National Labor Relations Board (Board) purposes, which circuit's law should apply is readily ascertainable when the Board cross-petitions to enforce its order before an adverse court, instead of invoking its transfer rights to enforce the order in a favorable venue. Under any of these scenarios, a multi-venue provision provides no plausible stumbling block to the agency knowing where it will have to defend its order.

Administrative Law > Separation of Powers > Executive Controls

Administrative Law > Judicial Review

HN7 Venue uncertainty cannot license an agency's improper nonacquiescence to a decision of a federal circuit court of appeal. Nothing about venue uncertainty excuses: (1) a less-than-candid representation of the agency's disagreement with adverse circuit law, (2) the failure to indicate the preservation of opposing arguments for U.S. Supreme Court review, or (3) a

failure to seek certiorari review of adverse decisions to achieve a national resolution. Letting the mere possibility of venue uncertainty excuse those conditions not only makes nonacquiescence unbounded—it also would be a failure. Distinguishing, case-by-case, plausible venue uncertainty from intracircuit nonacquiescence is critical to avoid nonacquiescence in its most sweeping sense, i.e., a form divorced from the end of judicial finality and the requirement of candor.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

HN8 The standard for an award of attorney fees for bad faith is met where the party receiving the award has been the victim of unwarranted, oppressive, or vexatious conduct on the part of his or her opponent and has been forced to sue to enforce a plain legal right. This principle is no less applicable to conduct occurring within litigation itself. To be sure, bad faith by a litigant is serious business, and the standard for finding it is, appropriately, stringent.

Judges: Before: BROWN and MILLETT, Circuit Judges, and GINSBURG, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge BROWN. Dissenting opinion filed by Circuit Judge MILLETT.

Opinion by: BROWN

Opinion

BROWN, *Circuit Judge*: Heartland Plymouth Court MI, LLC ("Heartland") successfully petitioned this Court to review an Order of the National Labor Relations Board ("the Board" or "NLRB"). The Order found Heartland violated its collective-bargaining agreement by failing to bargain over the *effects* of reducing employee hours. In granting the petition, we also denied the Board's cross-application to enforce its Order. Neither outcome was a surprise. As we explained in our Judgment, and as this Court had explained over a decade earlier, we possess a "fundamental and long-running disagreement" with the Board over "whether an employer has violated *section 8(a)(5) of the National Labor Relations Act* [NLRA] when it refuses to bargain with its union over a subject allegedly contained in a collective[-]bargaining agreement." *See Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 835, 369 U.S. App. D.C. 67 (D.C. Cir. 2005)*. Facts may be stubborn things, but the Board's longstanding "nonacquiescence" towards the law of any circuit diverging from the Board's preferred national labor **[*2]** policy takes obduracy to a new level. As this case shows, what the Board proffers as a sophisticated tool towards national uniformity can just as easily be an instrument of oppression, allowing the government to tell its citizens: "We don't care what the law says, if you want to beat us, you will have to fight us."

Emphasizing the real-world consequences of forcing parties to waste time and resources litigating, Heartland moves here for an award of attorney fees. In response, the Board provided a sweeping—and startling—defense of its nonacquiescence policy. The Board said it would be justified in refusing to apply the law of *any* circuit. The Board's logic makes no exception for the scenario in Heartland's case, where the Board knew that it would end up in a circuit with adverse law. Nor does the Board reject nonacquiescence when any presentation would be a putsch—*i.e., when no circuit at all supports the Board's legal position. See* NLRB Atty Fee Resp. Br. at 13 & n.8. Because the Board's actions go beyond whatever limited justification nonacquiescence may have, we agree with Heartland that the Board is guilty of bad faith, grant Heartland's motion for attorney fees, and award it $17,649.00. **[*3]**

I.

Factual Summary

Our Judgment already details the facts giving rise to the Board's NLRA suit against Heartland, and we need not repeat them here. *See* Dkt. No. 1611466 (hereinafter "Judgment"). For purposes of nomenclature, however, it is worth noting the Board's suit was predicated upon its view that the employer's refusal to bargain on a matter allegedly within a collective-bargaining agreement requires a "clear and unmistakable" waiver. Our precedent, in contrast, consistently rejects that view; considering the contents of a collective-bargaining agreement is a question of "contract coverage." This difference will manifest itself in the Board's conduct before our Court, which informs Heartland's motion for attorney fees.

Heartland first appealed the Board's adverse Order to our Court in 2013. *See* Case No. 13-1227. Due to the Supreme Court's pending decision in *NLRB v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)*, Heartland's appeal was held in abeyance. When the Supreme Court found the recess appointments of two Board members unconstitutional, the Board set aside its Order against Heartland, and moved to dismiss Heartland's appeal. We granted the Board's motion; the Board reassigned Heartland's case to a new panel—now properly comprised **[*4]** of Senate-confirmed Board members—and readopted its prior Order. *See* JA 533-

34. Unsurprisingly, Heartland appealed the Order here again. The Board, too, knew that this was Heartland's second appeal to the D.C. Circuit. *See* NLRB Merits Br. Cert. as to Parties, Rulings, and Related Cases ("The ruling under review has previously been before the Court."); NLRB Atty Fee Resp. Br. at 4 ("On January 29, 2015, a panel of the reconstituted Board issued a new Decision and Order *incorporating its earlier decision by reference*.") (emphasis added).

Given our well-established "contract coverage" precedent, Heartland's second appeal was pre-ordained.[1] Accordingly, Heartland's petition was granted, and the Board's cross-petition to enforce its Order denied, in an unpublished Judgment without oral argument. *See* FED. R. APP. 34(a)(2); D.C. Cir. R. 34(j); D.C. Cir. R. 36(d). As we said, "[t]he Board's refusal to adhere to our precedent dooms its decision before this court." Judgment at 2. While our Court previously recognized the Board's right of nonacquiescence, *see* Enloe, 433 F.3d at 838, we did so with a certain end in mind. *See* Judgment at 2. Namely, we presumed the Board would recognize a stalemate with our case law, one resolvable by seeking *certiorari* to the Supreme Court. *See* Enloe, 433 F.3d at 838.

In this case, the Board neither confessed the error of the Order against Heartland under our law, nor sought to preserve its argument against our precedent for *certiorari* (or even *en banc* reconsideration). The Board did not seek a transfer to the Sixth Circuit either. The Sixth Circuit embraces the Board's "clear and unmistakable" waiver policy. *See, e.g.,* Beverly Health and Rehab. Servs., Inc. v. NLRB, 297 F.3d 468, 480 (6th Cir. 2002). Further, Michigan, covered by the Sixth Circuit, is where Heartland's operations exist and where the conduct underlying the Board's dispute occurred. *See* Judgment at 1-2. It is thus the only other jurisdiction in which the NLRA permits an appeal on these facts. *See* ***HN1*** 29 U.S.C. § 160(f) (permitting petitions to review the Board's decisions to be filed "in the circuit wherein the unfair labor practice in question was alleged **[*7]** to have been engaged in or wherein [any aggrieved] person resides or transacts business, or in the United States Court of Appeals for the District of Columbia").[2]

In lieu of its legitimate options, the Board chose obstinacy. The Board cross-petitioned our Court to enforce its Order. In its responsive brief, the Board spent several pages asking us to uphold its "clear and unmistakable" waiver policy here. *See* NLRB Merits Br. at 17-20. Our adverse precedent made only a cameo appearance, where the Board spent a few sentences on an illusory distinction. *See id.* at 21-22 (stating *Enloe* does not apply "[b]ecause the effects of the change in hours are not matters that were covered by the parties' agreement," so, to the Board, "the contract coverage

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[1] Indeed, our rejection of **[*5]** the Board's "clear and unmistakable" waiver policy dates back more than two decades. *See* NLRB v. U.S. Postal Serv., 8 F.3d 832, 303 U.S. App. D.C. 428 (D.C. Cir. 1993). In *Postal Service*, we explained why "the 'covered by' and 'waiver' inquiries are analytically distinct: A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the [contract], the union has *exercised* its bargaining right and the question of waiver is irrelevant." *Id. at 836*; *see also* Regal Cinemas, Inc. v. NLRB, 317 F.3d 300, 312, 354 U.S. App. D.C. 398 (D.C. Cir. 2003). Despite the Board's insistence that its "clear and unmistakable" waiver analysis "has been approved by the Supreme Court," *see* NLRB Atty Fee Resp. Br. at 10, there is no conflict between the Supreme Court's pronouncements and ours. Both Metro. Edison Co. v. NLRB, 460 U.S. 693, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983) and Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 76 S. Ct. 349, 100 L. Ed. 309 (1956) recognize that the question of contractual coverage, one of contractual interpretation, is antecedent to the waiver question. *See* 460 U.S. at 706-10; 350 U.S. at 279 ("The answer turns upon the proper interpretation of the particular contract before us."). Curiously enough, the Board used to recognize this. *See, e.g.,* Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 22 (1st Cir. 2007) ("At times, however, the Board has determined, without much explanation, that the dispute was solely one of contract interpretation and that it was not compelled to endorse either of the[] two equally plausible interpretations.") **[*6]** (internal quotation marks omitted). By collapsing the contractual coverage question with the waiver question—as the Board's approach does—"an artificially high burden" is imposed on the employer. *See* Enloe, 433 F.3d at 837; *cf.* Department of Navy, Marine Corps Logistics Base v. Federal Labor Relations Authority, 962 F.2d 48, 57, 295 U.S. App. D.C. 239 (D.C. Cir. 1992) ("The result . . . is the addition of a novel 'specificity' requirement to the . . . 'covered by' test—*i.e.*, unless the [contract] *specifically addresses the precise matter at issue*, then that matter is not 'covered by' the agreement . . . .").

[2] The fact that Heartland's parent company "transacts business" outside the Sixth Circuit is irrelevant. *See, e.g.,* Bally's Park Place, Inc. v. NLRB, 546 F.3d 318, 320 (5th Cir. 2008) (noting this view among multiple circuits, holding "a parent corporation who is not a named party in the NLRB's final order may not seek review in the court of appeals because the parent corporation is not an 'aggrieved party' under the Act").

doctrine does not play a role"). The Board's tactics forced Heartland to waste resources in replying. *See* Heartland **[*8]** Merits Reply Br. at 2-3, 8-10.

Given the Board's behavior, it is little wonder that when Heartland moved for attorney fees, it sought fees under both the "not-substantially-justified" and "bad faith" provisions of the *Equal Access to Justice Act*. *See* 28 U.S.C. § 2412(b) (allowing "bad faith" attorney fee awards against the United States government); § 2412(d)(1)(A) (allowing attorney fee awards against the United States government "unless the court finds . . . the position of the United States was substantially justified . . . .").[3] Though Heartland also argues for attorney fees related to the Board's conduct at the administrative level, our award applies only to the Board's conduct before our Court.

Replying to Heartland's motion, the Board referenced its general policy of flouting any circuit's NLRA interpretation with which the Board disagrees—a policy described colloquially as "nonacquiescence." The Board's rationale for nonacquiescence is two-fold: (1) the NLRA's multi-venue provision, *see* 29 U.S.C. § 160(f), renders **[*9]** the Board clueless as to what circuit will govern the enforcement of its orders on appeal; and (2) the Board's "uniform and nationwide" jurisdiction over labor policy gives it the right to disagree with any circuit, whenever it wants. *See* NLRB Atty Fee Resp. Br. at 13-14. The Board ignores the fact that these two rationales invoke different forms of nonacquiescence. But, the breadth of the Board's argument reveals the first reason is largely delusory. The second reason—a species of nonacquiescence known as "intracircuit nonacquiescence"—provides the Board's overarching rationale. The Board thinks its right to disagree extends beyond preferring one circuit's position to another in a split, but also includes "stak[ing] out its own position contrary" to *any* circuit. *See id.* at 13. The Board identifies *no limit* to its nonacquiescence. Neither the Board's abusive tactics nor the extremism asserted in opposition to Heartland's motion for attorney fees are justified.

II.

The Propriety of Nonacquiescence

We begin first with ***HN2*** the goal of nonacquiescence, as stated by the Board itself over sixty years ago: to "achieve[]" "a uniform and orderly administration of a national act, such as the [NLRA]." *See* Ins. Agents Int'l Union, 119 NLRB 768, 773 (1957). By "determin[ing]" "whether **[*10]** to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding *until the Supreme Court . . . has ruled otherwise*," *id.* (emphasis added), the Board claims to ensure a nationally uniform labor policy. Understood in the most charitable light, not acquiescing to a given circuit's diverging legal interpretation until the Supreme Court has the last word puts two roles in harmony—the Board's role of national say in what labor law should be, and "the judicial department['s]" "emphatic[]" "province and duty . . . to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

Our approval of nonacquiescence presumed its stated virtue: opposing adverse circuit decisions permits the Board to bring national labor law questions to Supreme Court resolution. *See, e.g.*, Enloe, 433 F.3d at 838 ("The Board is, of course, always free to seek *certiorari*."); Yellow Taxi Co. v. NLRB, 721 F.2d 366, 385, 232 U.S. App. D.C. 131 (D.C. Cir. 1983) (Wright, J., concurring) (observing, in our circuit's first embrace of nonacquiescence, it would be "unwise" to oppose it, "particularly in light of the instances in which positions taken by the Board were first repeatedly rejected by a large number of circuits, then accepted by others, and later accepted by the Supreme **[*11]** Court"). Indeed, when our Court discussed different forms of agency nonacquiescence in Johnson v. United States Railroad Retirement Board., 969 F.2d 1082, 297 U.S. App. D.C. 82 (D.C. Cir. 1992), it predicated the method's acceptability upon the agency *redressing* a circuit's conflicting interpretation, *not defying* it *ad infinitum. See* id. at 1092 ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court.").

To that end, nonacquiescence allows for an issue's "percolation" among the circuits; generating a circuit split that can improve the likelihood of *certiorari* being granted. *See* id. at 1093; *see also* id. at 1097 (Buckley, J., concurring in part and dissenting in part) ("Catching Congress's ear . . . is more easily said than done; and given the huge volume of petitions for *certiorari* that flood the Supreme Court, it is often [more] necessary to establish a split among the circuits before the Court will

[3] As we find that the Board's conduct before our Court warrants an attorney fee award for bad faith, we do not address whether Heartland is also entitled to attorney fees under the "not-substantially-justified" provision.

examine [the] issue."); *see also* Supreme Ct. R. 10(a) (Noting circuit splits as indicative of "the reasons the Court considers" to grant *certiorari*). But, nonacquiescence is justifiable only as a means to judicial finality, not agency aggrandizement. As we said in *Johnson*, ***HN3*** nonacquiescence is divorced from its purpose when an agency asserts **[*12]** it with no stated intention of seeking *certiorari*.[4] *See* 969 F.2d at 1092.

HN4 Achieving judicial finality through national uniformity requires nonacquiescence to rest on certain conditions. First, as explained above, any nonacquiescence depends upon the agency actually seeking Supreme Court review of adverse decisions.[5] Second, nonacquiescence requires candor in its application. *See* Estreicher & Revesz, Nonacquiescence, supra n.4, at 755. The agency should clearly assert its nonacquiescence, specifying its **[*13]** arguments against adverse precedent to preserve them for Supreme Court review. These two conditions characterize proper nonacquiescence.

In cases where the appeal implicates a statute's multi-venue provision, the reviewing Court must assess a third condition: venue uncertainty. When an agency's assertion of venue uncertainty is plausible on the facts and proper nonacquiescence is otherwise pursued, the agency acts in good faith. But, when an agency's assertion of venue uncertainty is implausible on the facts, the situation is no different than intracircuit nonacquiescence—where the agency's conduct would constitute bad faith if its nonacquiescence is not clearly asserted and accompanied by a preservation of arguments for Supreme Court or *en banc* review. *Cf.* Johnson, 969 F.2d at 1091-92 (rejecting the agency's assertion of nonacquiescence **[*14]** when "[t]here [was], of course, some venue uncertainty under the . . . statute . . . . But the Board has never attempted to invoke venue uncertainty to justify its actions, and it seems to be asserting a right of nonacquiescence in its most sweeping sense."). Given the facts here, this third condition requires some elaboration.

HN5 Intracircuit nonacquiescence is not the same as refusing to apply an adverse circuit's law due to the underlying statute's multi-venue provision. For example, when a party appeals an adverse NLRB order under the NLRA, the statute provides the appealing party with multiple venue options. *See* 29 U.S.C. § 160(f). This uncertainty means, in some circumstances, the Board may have issued its order "without knowing which circuit court ultimately will review its actions." Johnson, 969 F.2d at 1091. In those circumstances, the Board's nonacquiescence to an adverse circuit's law is a function of ignorance, not defiance.

There are, however, multiple instances when an agency's assertion of venue uncertainty is implausible, *i.e.*, it knows that its order will be subjected to an adverse circuit's law on appeal. Estreicher & Revesz point out two examples: (1) when "all courts of proper venue have adopted positions contrary to **[*15]** the agency's policy"; and (2) when an order has been issued by an agency on remand from an adverse circuit court which retained jurisdiction over the action. *See* Estreicher & Revesz, Nonacquiescence, supra n.4, at 687 & n.34. In these cases, any nonacquiescence is necessarily intentional and, thus, of the intracircuit variety. These are just "example[s]," however, *see* id. at 687, and there are others. ***HN6*** When a case's facts result in only two venue choices for the party appealing the adverse order, and one circuit's precedent is in agreement with the agency's legal interpretation while the other is adverse to it, the agency knows any appeal will be to the adverse circuit. *See* Ithaca Coll. v. NLRB, 623 F.2d 224, 227 (2d Cir. 1980) ("Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit."). Furthermore, "for [NLRB] purposes, which circuit's law should apply is readily ascertainable" when it cross-

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[4] The seminal academic discussion of agency nonacquiescence adds an important point to the insistence on seeking Supreme Court review:

> Of course, agencies generally cannot directly petition the Supreme Court but must obtain the clearance of the Solicitor General, ... We do not mean to authorize judicial review of the delicate negotiations and deliberative processes that inform the Solicitor General's decision whether or not to petition for *certiorari. Nevertheless, the government cannot defend continued nonacquiescence without seeking Supreme Court intervention merely because it has chosen to divide petitioning authority in this way*.

Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 756-57 (1989) (emphasis added).

[5] An agency may also petition a circuit to reconsider its adverse precedent via *en banc* review, but this is subject to even more limits. If there is little or no reason for the agency to conclude the circuit is open to revisiting its precedent—as is the case where a precedent has been reaffirmed multiple times—the agency should not irritate the Court with an *en banc* rehearing petition. *Cf.* ***FED. R. APP. P. 35(a)(1)***.

petitions to enforce its order before an adverse court, instead of invoking its transfer rights to enforce the order in a favorable venue. *Cf.* Donald L. Dotson & Charles M. Williamson, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739, 739 n.1 (1987) (noting the "Board's [historic] policy [was] to seek enforcement of its orders **[*16]** in the circuit in which the unfair labor practice arose. Therefore, for Board purposes, which circuit's law . . . is readily ascertainable"). Under any of these scenarios, the multi-venue provision provides no plausible stumbling block to the agency knowing where it will have to defend its order.

In any event, ***HN7*** venue uncertainty cannot license improper nonacquiescence. Nothing about venue uncertainty excuses: (1) a less-than-candid representation of the agency's disagreement with adverse circuit law; (2) the failure to indicate the preservation of opposing arguments for Supreme Court review; or (3) the failure to seek *certiorari* of adverse decisions to achieve a national resolution. Letting the mere possibility of venue uncertainty excuse those conditions not only makes nonacquiescence unbounded—it also would be a failure. Distinguishing, case-by-case, plausible venue uncertainty from intracircuit nonacquiescence is critical to avoid "nonacquiescence in its most sweeping sense," *i.e.*, a form divorced from the end of judicial finality and the requirement of candor. *See* Johnson, 969 F.2d at 1091-92; *see also* NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987) ("Any future act of 'nonacquiescence' should be dealt with by this court in the specific context in which **[*17]** it occurs so that we may address the agency's particular violation of the rule of law and fashion a remedy that is appropriate in light of all of the relevant circumstances.").

Unfortunately, the NLRB's history with nonacquiescence reveals "its primary goal is . . . to see its interpretation of the federal labor laws prevail in as many cases as possible, rather than to change contrary law in particular circuits or . . . serve as a percolator for the Supreme Court." *See* Ross E. Davies, *Remedial Nonacquiescence*, 89 Iowa L. Rev. 65, 100 (2003); *cf.* NLRB v. Gibson Prods. Co., 494 F.2d 762, 766 (5th Cir. 1974) ("It is apparent from the foregoing chronology of this case that the Board, disagreeing with [the Supreme Court's] requirement of contemporary necessity for a bargaining order in second category cases, has simply sought to avoid it . . . ."). Indeed, in the only instances we can find where the NLRB ever addressed the "contract coverage"—"clear and unmistakable" circuit split before the Supreme Court, the Board was *opposing certiorari*. None of the reasons the Board set forth in these briefs would prohibit seeking *certiorari* in an appropriate case.[6] Moreover, we are unmoved by the coincidence of the Board opposing *certiorari* in cases where *certiorari* was denied. *See* Davies, **[*18]** *Remedial Nonacquiescence*, 89 Iowa L. Rev. at 78 & n.43 (citing a 1997 letter from the acting NLRB solicitor to the clerk of the Fourth Circuit, which described the Board's "enviable record in the Supreme Court" as "persuasive evidence that the Board has exercised good judgment in deciding when it is appropriate to continue to insist that intermediate courts have overstepped their authority" in disagreeing with the Board). After all, there is a difference between theory and practice. *See* id. at n.45 (noting that, as of the article's 2003 publication, "[t]he Board has not been the prevailing party on the merits in a case before the Supreme Court since 1996."). It is difficult to see the Board's steadfast refusal to seek *certiorari* on the "contract coverage" question as something other than an evasion of finality in the name of hegemony.

As a former NLRB Chairman and Chief Counsel, respectively, explained:

> In fact, rather than promoting uniformity, the Board's policy of nonacquiescence has fostered a bifurcated system in which litigants willing to pursue their case to the appellate level are able to avoid

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[6] *See* NLRB Br. in Opposition to Petition for a Writ of Certiorari, *Road Sprinkler Fitters Local Union No. 699, etc. v. "Automatic" Sprinkler Corp. of Am.*, No. 97-1249, 1998 WL 3112646, pp.12-13 (opposing the Court's review of this circuit split because "[t]he [circuit] court's broader interpretation of the subcontracting clause does not, therefore, appear to turn on the legal standard," and "[i]n any event, the court of appeals' opinion can **[*19]** be read" to render the ***Section 8(a)(5)*** issue irrelevant); NLRB Br. in Opposition to Petition for a Writ of Certiorari, *General Power Comp. v. NLRB*, No. 99-419, 1999 WL 33640169, pp. 13-14 & n.8 (rejecting Supreme Court review because the petitioner was "jurisdictionally barred" from raising the contract coverage issue, "the Union did not relinquish its bargaining rights" "in any event," and "prior Board decisions that have applied [the] 'contract analysis'" that result in "any inconsistency" "should [be] resolve[d]" by the Board "rather than this Court"); NLRB Br. in Opposition to Petition for a Writ of Certiorari, *Rochester Gas and Elec. Corp. v. NLRB*, No. 12-1178, 2013 WL 3959892, pp. 16-17 ("Although certain aspects of *Enloe*'s analysis are in tension with the court of appeals' analysis here, *Enloe* does not support the per se rule that petitioner advocates . . . . Certiorari therefore is not warranted . . . .").

> [the] Board['s] orders. Thus, the Board's policy has had the effect of needlessly protracting litigation, establishing a two-tiered system of labor law **[*20]** in the same jurisdiction, encouraging disrespect for [the] Board['s] orders, and antagonizing the courts . . . *Even worse, it compels litigants to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order*.

Dotson & Williamson, *NLRB v. The Courts*, 22 WAKE FOREST L. REV. at 745 (emphasis added). Our Court shares these concerns. We noted in *Johnson* that nonacquiescence allows agencies to work their will on not only the courts, but on the American people too. *See* 969 F.2d at 1092 ("The Board, in the end, can hardly defend its policy of selective nonacquiescence by invoking national uniformity. The policy has precisely the opposite effect, since it results in very different treatment for those who seek and who do not seek judicial review.").

For these reasons, and others, our sister circuits have spilled much ink admonishing the NLRB's nonacquiescence. *See* id. at 1091 ("Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it."); Dotson & Williamson, *NLRB v. The Courts*, 22 WAKE FOREST L. REV. at 739-40 n.3 (finding instances of circuit courts rejecting the Board's nonacquiescence dating back as early as 1953). We also think "the Board should reconsider its single-minded **[*21]** pursuit of its policy goals without regard for the supervisory role of the Third Branch." *See, e.g.,* Glenmark Assocs. Inc. v. NLRB, 147 F.3d 333, 339 n.8 (4th Cir. 1998).

In *Yellow Taxi*, we warned the NLRB that sweeping nonacquiescence "may . . . require[] [us] to secure adherence to the rule of law by measures more direct than refusing to enforce its orders." 721 F.2d at 383. At least one other circuit has already awarded attorney fees against the NLRB for relitigating, via nonacquiescence, an issue the Court already decided. *See* Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983). More than a decade ago, we told the NLRB that our positions on the "contract coverage" analysis were "stalemated" absent the Board seeking *certiorari*. *See* Enloe, 433 F.3d at 838. Not only has the Board refused to do so over the ensuing decade, its theory in support of nonacquiescence grows even more sweeping. In short, as we said of the Rail Road Retirement Board in *Johnson*: "After ten years of percolation, it is time for the Board to smell the coffee." 969 F.2d at 1093.

III.

The Board's Nonacquiescence Against Heartland Amounts To Bad Faith

The legal dispute in Heartland's case demonstrates persistent nonacquiescence without either candor or the pursuit of judicial finality. As we mentioned, our "contract coverage" case law has diverged from the Board's "clear and unmistakable" **[*22]** waiver policy for almost a quarter century. Now, seven of the twelve geographic circuits take a side in that debate.[7] With a split engulfing most circuits, there is no serious argument for nonacquiescence in the name of percolation. *Cf.* Johnson, 969 F.2d at 1093 ("But now that three circuits have rejected the Board's position, and not one has accepted it, further resistance would show contempt for the rule of law."); id. at 1097 (Buckley, J., concurring in part and dissenting in part) ("[G]iven the huge volume of petitions for certiorari that flood the Supreme Court, *it is often necessary to establish a split* among the circuits before the Court will examine an issue") (emphasis added). And yet here, the Board gave us no indication at all that it intends to seek *certiorari* of any adverse ruling, or *en banc* reconsideration of our precedent. Indeed, the Board did not even invoke nonacquiescence by name until it replied to Heartland's motion for attorney fees.

Worse still, the Board's lack of candor is evident in its handling of our "contract coverage" precedent. **[*23]** Rather than confess the error of its Order against Heartland under our law, the Board's merits brief, in relevant part, urges us to embrace the "reasonableness" of its "clear and unmistakable" waiver analysis. *See* NLRB Merits Br. at 17-20. Then, as a brief aside, it pretends there is no conflict between its Order and our law. *See id.* at 21 ("[B]ecause the effects in the change in hours are not matters that were covered by the parties' agreement, the contract coverage doctrine does

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[7] *Compare* Bath Marine Draftsmen's Ass'n, 475 F.3d at 25 ("[W]e adopt the District of Columbia Circuit's contract coverage test . . . ."); U.S. Postal Serv., 8 F.3d at 836 (same); Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992) (same) *with* Local Union 36, IBEW, AFL-CIO v. NLRB, 706 F.3d 73 (2d Cir. 2013) ("clear and unmistakable" waiver); Local Joint Exec. Bd. of Las Vegas v. NLRB, 540 F.3d 1072 (9th Cir. 2008) (same); Beverly Health and Rehab Servs., Inc., 297 F.3d at 481-82 (same); Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692 (10th Cir. 1996) (same).

not play a role"). The Board's reasoning is nonsensical because, if a subject is not covered by a contract, then the contract certainly does not clearly and unmistakably waive bargaining over that matter. "[D]isguis[ing] its disagreement by means of a disingenuous distinction of adverse circuit precedent" is yet another indication of improper nonacquiescence. *See* Estreicher & Revesz, *Nonacquiescence, supra n.4, at 755*.

On these facts, nothing about the NLRA's multi-venue provision sanitizes the Board's eleventh-hour nonacquiescence plea. The Board knew ruling against Heartland would prompt an appeal to our circuit. Why? *It already did*. Recall that Heartland previously appealed the same ruling to our Court before the case was held in abeyance due to *Noel Canning. See* ***[*24]*** NLRB Merits Br. Cert. as to Parties, Rulings, and Related Cases ("The ruling under review has previously been before the Court."). When the Board readopted its prior Order against Heartland—with the only material difference being that the Board panel was now comprised of Senate-confirmed members—it had every reason to think Heartland would appeal here again. For another matter, Heartland's appellate options were twofold: (1) our circuit, to which it previously appealed the same substantive Order and which has favorable law; or (2) the Sixth Circuit, which embraces the Board's "clear and unmistakable" waiver policy. There is no reason to think Heartland would seek appellate review in a circuit where it would almost certainly lose. *See Ithaca Coll., 623 F.2d at 227* ("Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit."). On these facts, it requires a willful suspension of disbelief to think: (1) Heartland would *not* appeal again; and (2) would not appeal again *here*.

If the Board did not want to sacrifice its Order against Heartland or defend nonacquiescence before us, it still had a viable option: transfer the case to the Sixth Circuit. As **[*25]** we noted above, the facts favored a transfer, and the Board's Order would have almost assuredly been enforced in that jurisdiction. The Sixth Circuit accepts the Board's "clear and unmistakable" waiver position; the NLRA allows the Sixth Circuit jurisdiction over Heartland's appeal; Heartland's operations are within the Sixth Circuit; and the underlying conduct took place within the Sixth Circuit.[8] Instead, the Board cross-petitioned for enforcement here. This was punitive. The Board chose to put its Order on a suicide mission with our precedent simply to lock horns with Heartland. The Board was the perpetrator here, not venue uncertainty.[9]

There is one other indication that venue uncertainty is not the real reason behind the Board's behavior. The Board's response to Heartland's attorney fee motion offers an extreme and unbounded view of nonacquiescence. This position, combined with the Board's conduct on the merits, embraces the following nonacquiescence standard: the Board can employ

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[8] If the Board moved for enforcement in the Sixth Circuit first, *28 U.S.C. § 2112(a)(1)* and *(5)* would have allowed the Board to file a motion to transfer venue once Heartland filed its petition for review here. Alternatively, the Board could have moved to transfer venue after Heartland filed here, regardless of whether the Board had filed in the Sixth Circuit first. *See Eastern Air Lines, Inc. v. Civil Aeronautics Bd., 354 F.2d 507, 510, 122 U.S. App. D.C. 375 (D.C. Cir. 1965)* ("Without regard to the authority provided by *28 U.S.C. § 2112*, a court of appeals having venue may exercise an inherent discretionary power to transfer the proceeding to another circuit in the interest of justice and sound **[*26]** judicial administration."); *see also 28 U.S.C. § 2112(a)(5)* ("For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.").

[9] Perhaps Heartland could have moved for summary disposition at the appeal's outset, *see* D.C. Circuit Handbook of Practice & Internal Procedures, § VIII.G, but this does not absolve the Board from paying Heartland's attorney fees. "Summary reversal is rarely granted," *id.*, and requires establishing that "no benefit will be gained from further briefing and argument of the issues presented," *Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298, 260 U.S. App. D.C. 334 (D.C. Cir. 1987)*. To meet this standard, Heartland would have had to do more than just file the two-page Petition for Review and the three-page Statement of Issues it filed to appeal here; it would have had to file a full-fledged brief in support of its motion for summary reversal, while likely still filing the Petition and Issues Statement in the alternative. Then, when the Board filed its inevitable response, Heartland would presumably file a reply brief. It is not at all clear this motions practice would have meaningfully reduced Heartland's attorney fees. Moreover, Heartland's **[*27]** argument for attorney fees is *not* a rejection of the Board's right to *properly* engage in nonacquiescence. *See, e.g.*, Heartland Reply Br. in Support of Mot. for Atty Fees, at 3-4. Had the Board replied to Heartland's motion for summary dismissal with an indication that it was preserving its argument against our precedent for Supreme Court review or *en banc* reconsideration, it is not clear this would be a case where "no benefit will be gained from further briefing and argument on the issues presented," *Stanley, 819 F.2d at 298*. In short, even if Heartland did not make perfect litigation choices, only the Board made choices in bad faith.

nonacquiescence: (1) without ever saying so to the Court until after judgment is entered; (2) without ever seeking *certiorari* to resolve the disputed issue; (3) even when it knows what law will apply in advance of the appeal; and **[*28]** (4) even when every circuit in the country disagrees with it. *See* NLRB Atty Fee Resp. Br. at 13-14. In sum, the Board's candor-free approach to nonacquiescence asks this Court to let the Board do what no private litigant ever could: make legal contentions not warranted by existing law and supported by no argument for modifying, reversing, or establishing new law. This is intolerable. *See, e.g.*, Fed. R. Civ. P. 11(b)(2). We are under no obligation to bless the desire of "federal agencies [to] be subject to no law at all—as, indeed, it appears [the NLRB] believe[s] to be the case." *See* United States DOE v. Federal Labor Rels. Auth., 106 F.3d 1158, 1164-67 (4th Cir. 1997) (Luttig, J., concurring). Had Heartland's case been one where the Board carefully applied nonacquiescence towards national uniformity, it would have proceeded differently. Where, as here, the Board "assert[s] a right of nonacquiescence in its most sweeping sense," and where its "sincerity" towards national uniformity is doubtful on the case's facts, the theoretical possibility of "some venue uncertainty" is rendered an implausible justification. *See* Johnson, 969 F.2d at 1091-92.

Taken together, the Board's conduct before our Court makes out a clear case of bad faith litigation. ***HN8*** The standard for an award of attorney fees for bad faith is met "where the party receiving the **[*29]** award has been the victim of unwarranted, oppressive, or vexatious conduct on the part of his opponent and has been forced to sue to enforce a plain legal right." Am. Hosp. Ass'n v. Sullivan, 938 F.2d 216, 222, 290 U.S. App. D.C. 397 (D.C. Cir. 1991). Contrary to the out-of-circuit cases the Board cites, "[t]his principle is no less applicable" to conduct occurring within litigation itself. *Id.* To be sure, "[b]ad faith by a litigant is serious business, and the standard for finding it is, appropriately, 'stringent.'" Id. at 223 (D.H. Ginsburg, J., dissenting). But the Board's conduct before us manifests a stubborn refusal to recognize any law.

The Board's obstinacy forced Heartland to waste time and resources fighting for a freedom the Board knew our precedent would provide. The Board did nothing to employ permissible nonacquiescence; it just saved the concept as a *post-hoc* rationalization in case Heartland had the temerity to ask us not to make it pay for the Board's hubris. And worse, when it did finally mention nonacquiescence in response to Heartland's attorney fee motion, the Board proposed an exasperatingly expansive rationale.

It is clear enough that the Board's conduct was intended to send a chilling message to Heartland, as well as others caught in the Board's crosshairs: "Even if **[*30]** we think you will win, we will still make you pay." This roguish form of nonacquiescence assures the Board's gambit is virtually cost-free—the Board either enjoys the fruits of a settlement, or it dares a party to employ "the money and power [needed] to pay for and survive the process of fighting with an agency through its administrative processes and into the federal courts of appeals." Davies, *Remedial Nonacquiescence*, 89 Iowa L. Rev. at 79. With seeking *certiorari* or *en banc* reconsideration in its hands, the Board can decide it is worth losing a few battles to still win the war. The Board can thus continue its adherence to the "clear and unmistakable" waiver policy without the Supreme Court ever telling it to stop, even with the occasional defeat in an adverse circuit. This bald attempt at a litigation advantage is bad faith. *See* Sullivan, 938 F.2d at 222; *cf.* id. at 223-24 (D.H. Ginsburg, J., dissenting) (arguing against a finding of bad faith because, unlike here, "I am aware of no reason for believing that the Secretary thought or could reasonably have thought he would gain any advantage" from perpetuating confusion about the law and "chilling" private parties "in the assertion of their rights").

A few words in response to our dissenting **[*31]** colleague. The dissent acknowledges the propriety of awarding Heartland fees based on the Board's "failure to candidly acknowledge binding circuit precedent in its answering brief and for pressing only a gossamer-thin argument for distinguishing *Enloe*." Dissent Op. 8. We also agree that "an agency's persistent defiance of uniform and settled circuit precedent could ignite a separation-of-powers firestorm." *See id.* at 1. The Board should take note of these conclusions.

We are at a loss to understand, however, how either of these conclusions is consistent with the rest of the dissent. If the Board's reply brief merits a fee award, was it not "thumbing its nose at settled decisional law?" *But see id.* at 1. If "Heartland had to file a petition for judicial review in this circuit," *id.* at 4, where else could the Board expect to be? *But see id.* As the Board cross-petitioned to enforce its own Order here—asking us to bless its "clear and unmistakable" waiver policy in the process—did it not do more than simply "litigat[e] [Heartland's] appeal?" *But see id.* at 3. Is the Board's refusal to seek *certiorari* on the "contract coverage" issue, even after it has percolated among the circuits,

something other than "persistent defiance" of **[*32]** judicial finality? *But see id.* at 1. The Board's entire litigation conduct before us consisted of: (1) a reply brief that every member of this Panel finds susceptible to the bad faith label; (2) a cross-petition the Board knew our precedent would not permit, but would force Heartland to respond; and (3) labeling all of this "nonacquiescence" only after the fact, and with the most sweeping logic. The bad faith speaks for itself.

Granting Heartland's motion for attorney fees "serve[s] the dual purpose of vindicating judicial authority . . . and making the prevailing party whole for expenses caused by his opponent's obstinacy." *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). We recognize the Board's unimpeded access to the public fisc means these modest fees can be dismissed as chump change. But money does not explain the Board's bad faith; "the pleasure of being above the rest" does. *See* C.S. Lewis, MERE CHRISTIANITY 122 (Harper Collins 2001). Let the word go forth: for however much the judiciary has emboldened the administrative state, *we* "say what the law is." Marbury, 5 U.S. (1 Cranch) at 177. In other words, administrative hubris does not get the last word under our Constitution. And citizens can count on it.

IV.

For the foregoing reasons, we grant Heartland's motion for **[*33]** attorney fees and award it $17,649.00 for the Board's bad faith litigation.

So ordered.

Dissent by: MILLETT

Dissent

MILLETT, *Circuit Judge*, dissenting:

I certainly understand my colleagues' concern that an agency's persistent defiance of uniform and settled circuit precedent could ignite a separation-of-powers firestorm. But this case is nothing like that, and I strongly disagree that a bad-faith award of all the fees that Heartland incurred in this appeal is warranted.

Awarding fees for bad faith is an exceptional sanction that should only be employed "when extraordinary circumstances or dominating reasons of fairness so demand." Nepera Chem., Inc. v. Sea-Land Serv., Inc., 794 F.2d 688, 702, 253 U.S. App. D.C. 394 (D.C. Cir. 1986). The standards for bad faith "are necessarily stringent," Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 180, 214 U.S. App. D.C. 1 (D.C. Cir. 1980) (quotation marks and citation omitted), requiring a factual finding that "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) (internal quotation marks omitted). Moreover, "[b]ecause inherent powers" like an attorneys' fees sanction for bad faith "are shielded from direct democratic concerns, they must be exercised with restraint and discretion." Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). That especially demanding standard is not met in this case, for four reasons.

First, for all of the majority opinion's concerns about an agency **[*34]** thumbing its nose at settled decisional law, this case involves an issue on which there is an inter-circuit conflict and on which the Board's position accords with the *majority* view. *Compare* Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB, 706 F.3d 73, 81-82 (2d Cir. 2013) (adopting the Board's "clear and unmistakable waiver" test); Local Joint Exec. Bd. of Las Vegas v. NLRB, 540 F.3d 1072, 1079-1080 & n.11 (9th Cir. 2008) (same); Beverly Health & Rehab. Servs., Inc. v. NLRB, 297 F.3d 468, 481-482 (6th Cir. 2002) (same); Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692, 697 (10th Cir. 1996) (same), *with* Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007) (adopting contract-coverage rule); NLRB v. United States Postal Serv., 8 F.3d 832, 836, 303 U.S. App. D.C. 428 (D.C. Cir. 1993) (same); Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992) (same). *See also* Mississippi Power Co. v. NLRB, 284 F.3d 605, 612-613 (5th Cir. 2002) (describing the competing standards).

So there has been no "putsch" here (Majority Op. 3). This case, by its terms, does not implicate at all the majority opinion's concerns about a Board refusal to acquiesce in the face of uniformly adverse circuit precedent. To be sure, the Board discussed a potentially sweeping realm for non-acquiescence in its brief. *See* NLRB Opp'n to Mot. for Att'y Fees at 13. But the bad faith for which we can authorize fees must have occurred in the Board's actual conduct of its appellate litigation in the case at hand, not in a later overstatement in its opposition to attorneys' fees concerning hypothetical facts not before us.

Second, the last time the Board was before this court *on*

this very same issue, this court unanimously assured the Board that it had "every right" to "refuse[] to acquiesce in our analysis" of **[*35]** when and under what circumstances the terms of a collective bargaining agreement may discharge an employer's collective-bargaining duties. *Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 838, 369 U.S. App. D.C. 67 (D.C. Cir. 2005)*. *See generally, e.g., Independent Petroleum Ass'n v. Babbitt, 92 F.3d 1248, 1261, 320 U.S. App. D.C. 107 (D.C. Cir. 1996)* ("[I]ntercircuit nonacquiescence is permissible, especially when the law is unsettled."); *American Tel. & Tel. Co. v. FCC, 978 F.2d 727, 737, 298 U.S. App. D.C. 230 (D.C. Cir. 1992)* (acknowledging the agency's "right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute"); *Johnson v. United States R.R. Ret. Bd., 969 F.2d 1082, 1093, 297 U.S. App. D.C. 82 (D.C. Cir. 1992)* (noting the general right of an agency to engage in inter-circuit nonacquiescence, at least where its position has not been rejected by every circuit to address the question). The Board should not be labeled a "bad faith" actor for taking this court at its word and litigating the appeal *at all*, which is what the comprehensive award of attorneys' fees for the entire appeal does.

In particular, I see nothing remotely approaching bad faith in requiring Heartland to file its petition for review and to prosecute its appeal by filing either an opening brief or, easier still, a motion for summary reversal, *see* D.C. Cir. *Handbook of Practice and Internal Procedures* VII.G.[1] That is because Heartland is located within the jurisdiction of the Sixth Circuit, and the law of that circuit is on all fours with the Board's "clear and unmistakable **[*36]** waiver" rule. *See, e.g., Beverly Health, 297 F.3d at 480* ("A management-rights clause is a waiver of the union's right to bargain over [mandatory subjects]."); *id.* ("A union can waive its statutory right to bargain [in a collective bargaining agreement], but such a waiver must be 'clear and unmistakable.'") (quoting *Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983)*; *Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284, 1290 (6th Cir. 1997)* (similar).

Accordingly, as the majority opinion acknowledges (at 5-6, 19), there was nothing remotely bad faith about the Board's application and enforcement of its "clear and unmistakable waiver" rule in the agency proceedings. And given the Board's decision, Heartland was destined to *lose* unless and until it sought judicial review in this circuit rather than the Sixth Circuit. Had the Board filed first in the Sixth Circuit, Heartland's petition for review would have been doomed. In short, having lost before the Board in a proceeding that quite properly applied the "clear and unmistakable waiver" rule, Heartland had to file a petition for judicial **[*37]** review in this circuit and had to affirmatively prosecute its appeal by filing an opening brief or motion for summary disposition raising the contract-coverage issue to have a legal leg to stand on. I do not understand how it could be bad faith for the Board to require that Heartland do so.

The majority opinion says (at 18) that the Board should have known the case was destined for this circuit after remand, and thus apparently should have given up before Heartland even filed its petition. But as the circuit conflict attests, plenty of losing litigants before the Board have chosen to litigate in their home jurisdictions long after this court first adopted the "contract coverage" rule in 1993, *see United States Postal Service, supra*, and even after our reaffirmation of that rule in *Enloe* in 2005, *see Bath Marine, supra*, *Local Union 36, supra*, and *Local Joint Exec. Bd., supra.* Moreover, this court did *not* retain jurisdiction after granting the Board's motion to dismiss the case in the wake of *NLRB v. Noel Canning, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)*. *See Heartland Plymouth Court MI, LLC v. NLRB, No. 13-1227, 2014 U.S. App. LEXIS 18137 (D.C. Cir. Aug. 26, 2014)*. There thus was no guarantee that the second round of review would land here just because the first one did. *Compare Starbucks Corp. v. NLRB, No. 09-1273, 2010 U.S. App. LEXIS 27852 (D.C. Cir. Aug. 19, 2010)* (dismissing petition for review **[*38]** on Board motion to reconsider in light of *New Process Steel v. NLRB, 560 U.S. 674, 130 S. Ct. 2635, 177 L. Ed. 2d 162 (2010)*, *with NLRB v. Starbucks Corp., 679 F.3d 70 (2d Cir. 2012)* (second petition for review filed in and adjudicated by the Second Circuit).

To be sure, the Board could have beaten Heartland to the punch by petitioning the Sixth Circuit for enforcement or moving to transfer the case to the Sixth Circuit. But the Board's failure to deprive an employer of its chosen forum for review or to forgo imposing on the employer the additional costs of litigating a transfer motion cannot by itself meet the "stringent" requirement for bad faith, *Nepera Chem., 794 F.2d at 702*.

[1] *See also Cascade Broad. Grp. v. FCC, 822 F.2d 1172, 1174, 262 U.S. App. D.C. 110 (D.C. Cir. 1987)* (per curiam) ("We take this occasion to inform the bar that henceforth we will treat motions for summary disposition in appeals and petitions for review of agency action as we treat such motions in appeals from judgments of the district court.").

Third, the majority opinion (at 17) decries the Board's failure to have sought certiorari to resolve the circuit conflict in an earlier case. But, again, the question is whether the Board litigated *this appeal* in bad faith, not whether it should have taken an additional procedural step in some other case. Sanctioning the Board for failing to seek certiorari is doubly inappropriate because the questions of whether and when Supreme Court review should be sought to eliminate the conflict and establish a single, uniform federal rule rest *exclusively* with the Solicitor General in the Department of Justice and not with the Board. *28 U.S.C. § 518(a)*; *see also 28 C.F.R. § 0.20* (Solicitor General is assigned **[*39]** duty of "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for and in opposition to certiorari"). Surely we cannot sanction as "bad faith" the Board's failure to make a decision Congress has said it cannot make.

It also bears noting that cases in which the Board ends up at loggerheads with this court's contract-coverage rule do not appear to arise with significant frequency. Since we first adopted the contract-coverage rule for Board cases in 1993 in *United States Postal Serv.*, only *Enloe* and this case have arisen in which the Board found itself directly at odds with circuit precedent. That is only two cases in 23 years. The Board, moreover, has won more than it has lost in circuit court decisions generally, and in this circuit has argued in other cases that its order can be sustained under either standard. *See BP Amoco Corp. v. NLRB, 217 F.3d 869, 873, 342 U.S. App. D.C. 363 (D.C. Cir. 2000)* ("Here, the Board acknowledges the force of the 'covered by' principle but contends it does not apply because the Board's decision expressly found that the collective bargaining agreement did not incorporate the reservation of rights clauses."). The frequency with which a conflict is joined and whether a Supreme Court decision in the particular **[*40]** case would have any practical effect on the outcome of the case—whether the dispute over the standard of review is outcome determinative—are among the traditional factors that the Solicitor General could reasonably consider in selecting the issues it chooses to present to the Supreme Court each year for certiorari review. *See Johnson, 969 F.2d at 1097* (Buckley, J., concurring in part and dissenting in part) (discussing legitimate governmental considerations that may result in agency non-acquiescence in conflicting circuit decisions enduring for some time); *see generally* Margaret Meriweather Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, *51 B.C. L. Rev. 1323, 1328-1330 (2010)* (discussing certiorari factors considered by Solicitors General).

Fourth, the award of fees for bad faith is an equitable exercise of the court's inherent power to control litigation before it. *See, e.g., Copeland v. Martinez, 603 F.2d 981, 984, 195 U.S. App. D.C. 399 (D.C. Cir. 1979)* (award of fees serves to "protect[] the integrity of the judicial process"). And in this case, Heartland bears responsibility for a not insignificant amount of the fees it incurred.

To begin with, given the clarity of our precedent, Heartland could have short-circuited this litigation by moving for summary reversal. To be sure, **[*41]** a party seeking summary disposition bears "the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987)* (per curiam). But for many of the reasons the majority opinion discusses (at 4-5 & n.1), the law in this circuit was just that clear and plainly adverse to the Board's position, making this a signature case for such summary disposition.

Contrary to the majority opinion's suggestion (at 19 n.9), an opposition by the Board preserving its arguments for review en banc or by the Supreme Court would not have altered the straightforward task of panel disposition since the law of the circuit would have controlled. *See, e.g., LaShawn A. v. Barry, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996)* (en banc) ("[T]he *same issue* presented in a *later case* in the *same court* should lead to the *same result*.") (emphasis in original).

Heartland chose instead to initiate the ordinary briefing process and to then file a full-throated opening brief that raised additional issues for our review beyond the contract-coverage dispute. Heartland's failure to reasonably mitigate the fees it incurred should factor into the court's decision to award fees for bad faith. *See Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975)* ("An award [of fees] for obstinacy, although a penalty, is only **[*42]** for the unnecessary efforts occasioned by the obstinacy."); *cf. Leffler v. Meer, 936 F.2d 981, 987 (7th Cir. 1991)* (noting "the duty to mitigate legal fees by promptly, where possible, disposing of baseless claims through summary procedures"); *Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988)* (factoring into fee award "the extent to which the nonviolating party's expenses and fees could have been avoided or were self-imposed").

Worse still, Heartland itself filed a vastly overblown

application for fees that unjustifiably included the agency litigation that the Board had every right to pursue under the Sixth Circuit's "clear and unmistakable waiver" precedent. Heartland thus has not exhibited the care and calibration that equity desires in those who themselves seek equity.

Having said that, the majority opinion (at 17-18) quite fairly calls the Board out for its failure to candidly acknowledge binding circuit precedent in its answering brief and for pressing only a gossamer-thin argument for distinguishing *Enloe*. Indeed, I might well have been persuaded that a small amount of fees should be awarded only for the portion of Heartland's reply brief that was dedicated to rebutting the Board's frail argument. But that is not the course that the majority opinion takes or that Heartland sought. **[*43]**

For the foregoing reasons, I respectfully dissent.

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Chapter 9. Interpreting Contract Language

Link to Supplement

Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over "rights" under such agreements. In these cases, the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions.

9.1. DISPUTES OVER THE MEANING OF CONTRACT TERMS

9.1.A. Misunderstanding And The "Mutual Assent" Or "Meeting Of The Minds" Concept

When the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both

parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.

The conditions under which the existence of a supposed contract can be negated were cogently reviewed by Chief Judge Posner in *Colfax Envelope Corp. v. Graphic Communications Local 458-3M (Chicago).* [1] There, a collective bargaining agreement specified a minimum-manning requirement for printing presses as "4C 60 Press—3 Men." The designation was interpreted by the employer as referring to four-color presses 60 inches and over; by the union as four-color presses 60 inches and under; and by the district court as 60-inch presses only. In response to Colfax's suit under Section 301 of the Taft-Hartley Act [2] for a declaration that it had no collective bargaining agreement with the union because the parties had never agreed on an essential term—the manning requirements for Colfax's printing presses—Judge Posner remanded the matter for decision through the contractually provided arbitration process.

As Chief Judge Posner explained:

> This appeal in a suit over a collective bargaining agreement presents a fundamental issue of contract law, that of drawing the line between an ambiguous contract, requiring interpretation, and a contract that, because it cannot be said to represent the agreement of the parties at all, cannot be interpreted, can only be rescinded and the parties left to go their own ways. ...

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served by a provision can be ascertained, the purpose is to be given great weight in interpreting the words of the provision. [159] Arbitrators agree that an interpretation in tune with the purpose of a provision is to be favored over one that conflicts with it. [160]

9.3.A.Viii. The Contract As A Whole

The *Restatement (Second) of Contracts* comments:

> Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph. ... Where the whole can be read to give significance to each part, that reading is preferred. ... [161]

In the arbitral domain, numerous decisions have invoked this interpretive principle. One of the earliest stated:

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. [162]

In the years that followed, the concept that the disputed portions "must be read in light of the entire agreement" [163] has received widespread acceptance. [164]

Typical of arbitral thinking is the following:

> Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. ... The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole. [165]

When a contract contained both a clause stating that "wages shall be paid for jury duty and/or the answer of a subpoena" and a clause providing for time off for union business without pay, an arbitrator interpreted the former in light of the latter:

> When the negotiators of this agreement indicated and stated that payment shall be made for jury duty and in answer of a subpoena, they understood, presumably, that if the answer of a subpoena was for union business and its furtherance or for personal business, that no payment of wage would be made. [166]

9.3.A.Viii.A. Giving Effect To All Clauses And Words

If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. [167] In the words of one arbitrator:

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